Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JUDDS BROTHERS CONSTRUCTION COMPANY,

Petitioner,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a party's rights to due process and a jury trial under the Fifth and Seventh Amendments to the United States Constitution and F.R.Civ.P. 16(e) and 8(c) are fundamentally violated when a trial court departs from F.R.Civ.P. 8(c) and 16(e) and vacates a jury's findings on the basis of an affirmative defense not asserted in the pre-trial order. More specifically, whether a plaintiff's rights to due process and a jury trial are violated by a post trial ruling that the statute of frauds required vacation of a jury verdict, given that this affirmative defense was first pled but then waived when not set forth in the pre-trial order, was not argued during the trial, but without notice was then resurrected sua sponte in the court's post trial order.

2. Whether a party's rights to due process and a jury trial under the Fifth and Seventh Amendments to the United States Constitution and F.R.Civ.P. 8(c) and 16(e) are fundamentally violated when the appellate court effectively refuses to address whether the trial court committed constitutional and prejudicial procedural error in vacating a jury's finding on the basis of an unasserted trial issue regarding the statute of frauds.

3. Whether a party's rights to due process and a jury trial under the Fifth and Seventh Amendments to the United States Constitution and F.R.Civ.P. 16(e) and 8(c) are fundamentally violated when a trial court totally departs from F.R.Civ.P. 8(c) and 16(e) and vacates a jury's findings on the basis of the parol evidence rule and denies a plaintiff the opportunity to adduce evidence

QUESTIONS PRESENTED – Continued

related to the various exceptions to the parol evidence rule:

(a) where neither the pleadings nor pre-trial order raised the parol evidence rule as an affirmative defense or issue for trial; and

(b) where the trial court overruled all "In Limine" motions and trial objections based on the parol evidence rule;

4. Whether an appellate court departs from and totally disregards F.R.Civ.P. 8(c) and 16(e) and denies a party's Fifth and Seventh Amendments rights to fundamental due process by summarily disposing of the claim of constitutional error in a trial court's vacation of a jury's verdict on the basis of an unpled parol evidence and statute of fraud rules, by stating only that they thoroughly examined the "appellant's constitutional challenge and any other arguments not addressed by the District Court's opinion and find these issues to be without merit," given that the applicable standard of review requires that a jury verdict be affirmed unless the record is devoid of any evidence whatsoever to support it.

LIST OF PARTIES

There are no additional parties to those named in the caption of this matter. Atlas Company of Lincoln, Co-Defendant below, is not a party to this Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. There is no parent or subsidiary company of Judds Brothers Construction Company to be listed pursuant to Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Because there occurred such a radical departure from the accepted and usual course of judicial proceedings, the Petitioner, Judds Brothers Construction Company, respectfully requests that a writ of certiorari issue to review the order of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on July 9, 1999, affirming the judgment of the United States District Court for the District of Nebraska.

OPINIONS BELOW

The Eighth Circuit's order denying Petitioner's Petition for Rehearing and Rehearing En Banc, entered August 26, 1999, is unreported, but appended to this Petition. (App., *infra*, 127). The Eighth Circuit's panel opinion on the merits of the appeal is unreported, but appended to this Petition. (App., *infra*, 1). The Order of the United States District Court for the District of Nebraska granting Respondent's Motion for Judgment as a Matter of Law is unreported, but appended to this Petition. (App., *infra*, 4). The Memorandum Opinion of the United States District Court for the District of Nebraska granting Respondent's Motion for Judgment as a Matter of Law is unreported, but appended to this Petition. (App., *infra*, 5).

JURISDICTION

The order sought to be reviewed in this Petition was filed on July 9, 1999. (App., *infra*, 1). Petitioner filed a Petition for Rehearing and Rehearing en banc in the Eighth Circuit on July 22, 1999. The Eighth Circuit entered an order denying the Petition for Rehearing and for Rehearing en banc on August 26, 1999. (App., *infra*, 127). This Petition is filed within 90 days of the order of August 26, 1999.

The jurisdiction of this Court to review the order of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment V of the United States Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

2. Amendment VII of the United States Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, *and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law*" (emphasis added)

3. F.R.Civ.P. 8(c) provides:

> *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively,

accord and satisfaction, . . . failure of consideration, fraud, illegality . . . *statute of frauds . . . and any other matter constituting an avoidance* or affirmative defense. (emphasis added)

4. F.R.Civ.P. 16(e) provides:

Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. *This order shall control the subsequent course of the action* . . . The order following a final pretrial conference shall be modified only to prevent manifest injustice. (emphasis added)

STATEMENT OF THE CASE

On June 3, 1998, the United States District Court for the District of Nebraska[1] vacated an April 7, 1998, jury verdict in the amount of $791,232 entered in favor of Judds Brothers Construction Co. ("Judds") and against the Burlington Northern and Santa Fe Railroad ("Burlington"). (App., *infra*, 4-14). The jury found that the Burlington had breached an agreement with Judds in settlement of prior litigation between the parties. (App., *infra*, 115-116). Trial exhibits 81 & 85 were offered as evidence of an agreement (App., *infra*, 134-135, 138), and the court instructed the jury that they could consider such exhibits in determining whether an agreement existed. (App., *infra*, 111). Over Burlington's parol evidence objections, the trial court received testimony of the oral

[1] Jurisdiction in the District Court was based on 28 U.S.C. § 1332, pertaining to diversity of citizenship.

negotiations and agreements between the principal parties involved in the discussions. While Judds could have laid additional foundation under the fraud and other exceptions to both the parol evidence and statute of frauds rules, it did not do so because (1) the statute of frauds was not even an issue at the actual trial, (2) the parol evidence rule was not listed as an issue in the pretrial order and (3) the trial court, in overruling the objections, rendered additional evidence irrelevant and violative of F.R.Evid. 403.

The jury found: (a) that Judds and the Burlington had in fact entered into an agreement whereby Judds was to be permitted to bid on future projects and was to be awarded contracts if it were the low bidder; (b) that the Burlington breached such agreement; and (c) that Judds had been damaged in the amount of $791,232. (App., *infra*, 115-116).

However, after the close of evidence, on Burlington's motion for judgment as a matter of law ("JMAL"), the trial court ruled (1) that the evidence of the oral agreement was inadmissible because of a statute of frauds issue not raised in the pre-trial order, and (2) that any issue of a binding contract evidenced by written documents (Exhibits 81 & 85) was precluded by the unpled parol evidence rule. (App., *infra*, 5-14). Having made those post-trial determinations the trial court, instead of conducting further proceedings to allow Judds to fully develop the record and enter additional evidence of fraud and other relevant exceptions to the statute of frauds and parol evidence rule, simply entered judgment in favor of the Burlington.

On review, the Eighth Circuit Court of Appeals[2], affirmed the trial court's order stating only that it saw "no reason to undertake a protracted discussion on the subject" and that "for [Judds'] constitutional challenge and any other argument not addressed by the District Court's Opinion, we have thoroughly examined the record and transcripts and find these issues to be without merit". (App., *infra*, 3). Thus, Judds' arguments regarding both the fundamental denial of its right to due process, as guaranteed by the Fifth Amendment and the unexplained departure from F.R.Civ.P. 8(c) and 16(e) have never been considered by any court.

Judds believes that the incredible departure from both these sacred rules of procedure, notice, and process, and the JMAL standard of review recognized by every appellate court in the land – i.e. that no jury verdict will be vacated if there is any evidence which will support such verdict – constitute such a departure from the accepted and usual course of judicial proceedings that the supervision and intervention from this Supreme Court is justified. Since Judds has never been at least given the chance, after the trial court changed its evidentiary rulings, to lay additional foundation to further establish that the testimony at issue fell within one of the many exceptions to the parol evidence and statute of frauds rules, its basic and constitutional right to a trial by jury has been totally ignored.

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[2] Jurisdiction of the United States Court of Appeals for the Eighth Circuit was based on 28 U.S.C. §§ 1291, 1294(1) and Fed.R.App.P. 4(a).

To assure Judds its fundamental rights of due process at trial and on appeal, to have its constitutional issues considered on appeal, to preserve the integrity of our jury system, to avoid a conflict with the decisions of other panels of the Circuit Court of Appeals regarding the burden placed on a moving party to overturn a jury's verdict, to protect the sanctity of F.R.Civ.P. 8(c) and 16(e), and in the manifest interests of justice, Judds requests that this Court grant its petition for certiorari.

REASONS FOR GRANTING THE WRIT

1. THE DISTRICT COURT'S ORDER VACATING A JURY VERDICT ON THE BASIS OF AN UNPLED AFFIRMATIVE DEFENSE AND SUA SPONTE CONSIDERATION OF A STATUTE OF FRAUDS VIOLATION, AND ITS AFFIRMANCE BY THE EIGHTH CIRCUIT COURT OF APPEALS, DENIED THE PETITIONER ITS FUNDAMENTAL RIGHTS TO DUE PROCESS OF LAW, GUARANTEED BY STATUTE AND THE UNITED STATES CONSTITUTION.

In its Memorandum Opinion granting the Burlington's Motion for Judgment as a Matter of Law, the trial court held *sua sponte* that the previously admitted evidence of an oral agreement between the parties should have been excluded because of the statute of frauds. (App., *infra*, 12-14). In so ruling, the trial court inexplicably departed from F.R.Civ.P. 16(e) and rule 16(c) of the Local Rules of the United States District Court for the District of Nebraska which requires that all controverted issues be listed in the pre-trial order as an affirmative

defense. The defense was not set forth in the pre-trial order as required by F.R.Civ.P. 16(e), (App., *infra*, 63-72), and was not even argued at trial.

The trial court correctly noted that in considering a JMAL "the Court must resolve all evidentiary conflicts in favor of the non-moving party" and can grant such a motion in those instances where "there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party." (App., *infra*, 8). However, both the trial court and the appellate court clearly erred and denied Judds its constitutional right to have the facts determined by a jury when they inexplicably vacated a breach of contract verdict on grounds never pled, never set forth in the pre-trial order and never even argued at trial. JMALs are highly disfavored, *U.S. ex rel. Yesudian v. Howard University*, 153 F.2d 731 (D.C. Cir. 1998), and should be granted only "when all evidence points one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party." *Ehrhardt v. Penn. Mut. Life Ins. Co.*, 21 F.3d 266 (8th Cir. 1994). The "purpose of the rule pertaining to contents of answers and requiring matters constituting avoidance or affirmative defenses to be affirmatively pleaded is to prevent surprise." *Lopez v. U.S. Fidelity & Guaranty Co.*, 18 F.R.D. 59 (D.C. 1955). How then can the constitutional right to a jury trial and to due process be protected when trial and appellate courts clearly err in reversing jury decisions on the basis of a trial court's sua sponte enforcement of non-pre-trial issues and non-argued affirmative defenses? The jury system, the notice requirements of federal pleading

rules, of F.R.Civ.P. 8(c) and F.R.Civ.P. 16(e), mean nothing if such clear constitutional and statutory error is permitted.

During the trial, the court received into evidence extensive and substantial testimony of the oral agreement reached between Judds and the Burlington in settlement of a prior dispute. (App., *infra*, 144-359). Under this agreement Judds was to be permitted to bid on future Burlington construction projects and to be awarded contracts on those projects in which Judds was the low bidder. This evidence, according to the standards of review applied in all other circuits, was to be considered in the light most favorable to Judds. The jury verdict awarded Judds should have been vacated only if there was no set of facts upon which to sustain it. The Burlington's own witness, the individual actually involved in making the agreement with Judds, clearly testified that this ability to bid on future contracts was an element of the agreement, and that, in fact, the Burlington took steps to insure that Judds no longer be "blackballed" by the Burlington. (App., *infra*, 289-290). This witness, Mr. William Glavin, testified that it was "absolutely not" his intention to preclude Judds from bidding on Burlington's work (App., *infra*, 288); and that "as part of the discussions that led to the settlement, Ray [Judds] had the ability to bid on other Burlington Northern projects" (App., *infra*, 288). This was "part of the settlement agreement that (he) was working – that (they) were reaching with Judds Brothers on January 16, 1990" (App., *infra*, 289-290). Yet this evidence of the parties *oral* agreement was, after having been submitted to the jury, totally

excluded and ignored by the trial court's *sua sponte* decision based on the unargued affirmative statute of frauds defense which was initially pled but then waived when the Burlington did not include it in the pre-trial order. This "now you see it, now you don't" evidentiary activity completely blindsided Judds, denied Judds a hearing to raise the 16(e) issues and to lay additional foundation, and has no place in our federal system of jury trials.

The trial court never even considered or addressed the clear and unambiguous violations of F.R.Civ.P. 8(c) and 16(e). Furthermore, when these fundamental and most egregious errors, which violated the very safeguards of our jury system as set forth in U.S. Const., Amend. VII, were brought to the attention of the Eighth Circuit Court of Appeals, it, for some unknown reason, failed anywhere in its 2½ page decision to specifically address or explain this issue. (App., *infra*, 1-3). To this day, there has never been any written consideration of these constitutional and statutory violations by any court. Judds' right to a trial by jury and to have the verdict in its favor protected by the Constitution of the United States and by F.R.Civ.P. 8(c) and 16(e) have been trampled – all without any judicial consideration and without application of the standard of review which is applied by every other Circuit Court of Appeals.

If appellate courts refuse to follow their own standard of review and refuse to enforce F.R.Civ.P. 8(c) and 16(e), then a citizen's constitutional rights to a jury trial under the Seventh Amendment is meaningless.

2. THE TRIAL COURT'S ORDER, VACATING A JURY VERDICT ON THE BASIS OF AN UNPLED PAROL EVIDENCE ISSUE NOT SET FORTH IN THE PLEADINGS OR PRETRIAL ORDER, AND THE AFFIRMANCE THEREOF BY THE APPELLATE COURT, DENIED THE PETITIONER ITS FUNDAMENTAL RIGHTS TO DUE PROCESS OF LAW, AS GUARANTEED BY STATUTES AND THE CONSTITUTION OF THESE UNITED STATES.

Judds trial argument that the agreement to allow Judds to bid on Burlington contracts and be awarded the same if it was the low bidder, was presented to the jury. Written evidence of such agreement was presented through trial Exhibits 81 and 85 (App., *infra*, 134-135, 138), and the jury was informed, in instruction no. 17 (App., *infra*, 111) that it could consider Exhibits 81 and 85 in determining, under instruction no. 15 (App., *infra*, 109-110), whether "an agreement" had been reached.

F.R.Civ.P. 8(c) requires that "any other matter constituting an avoidance or affirmative defense" must be pled. F.R.Civ.P. 16(e) demands that a pretrial order "shall" be entered in each case, and that such "order shall control the subsequent course of the action." A parol evidence issue or defense was never pled by the Burlington (App., *infra*, 37-41, 56-60), and was never included as a specific issue in the pretrial order. (App., *infra*, 63-72).

Shortly before trial, the Burlington presented a Motion In Limine which presented, for the first time, the issue of the parol evidence rule as a defense to whether Judds could offer any evidence of an "Agreement". (App., *infra*, 139-143). This motion, and the numerous identical objections made by the Burlington at trial, were

all overruled. As such, Judds had no indication that it was necessary to offer any further evidence regarding fraud or any other exceptions to the parol evidence (such as the fact that under Nebraska law the existence of a written instrument does not prevent a party from proving a distinct oral agreement which constitutes a condition on which the performance of the written agreement is to depend. *Perry v. Gross*, 155 Neb. 662, 53 N.W. 2d 73 (1952)). Indeed, based on the court's overruling of such objection, any further evidence on the issue was irrelevant and its receipt would probably have violated F.R.Evid. 403.

All during the trial, the District Court received testimony of the "Agreement" between Judds and the Burlington, and continually overruled Burlington's parol evidence objection and the Burlington's continuing objection. (App., *infra*, 160-162). The trial court continually received oral testimony relating to the meaning of the written documents (Exhibits 81 and 85), which were, as a matter of undisputed fact, drafted by the Burlington. That document was drafted by the Burlington at a meeting with Judds' president which took place after the Burlington suggested that a meeting be held, *without lawyers*, to work out the differences between the parties. (App., *infra*, 136-137). That document was, however, drafted after the Burlington's representative left the meeting on various occasions to confer with his in-house counsel. (App., *infra*, 285-286).

Thus, Judds, because of the parol evidence rulings made during the course of the trial was never put on notice that further evidence regarding the exceptions to the parol evidence rule was necessary. Of course, since

the statute of frauds defense was never mentioned by anyone before the judge's JMAL order, no notice of its applicability ever occurred and no evidence of any exceptions to this rule was specifically proffered. Incredibly however, the trial court, after uniformly overruling all parol evidence objections, stated in its post-trial opinion, for the first time, that the parol evidence rule was applicable since Judds "did not allege or offer any evidence of fraud or mistake . . . " (App., *infra*, 12). This followed the court's suggestion during trial that the issue of the parol evidence rule was not even in the case.[3]

In affirming the trial court's order, the Eighth Circuit Court of Appeals stated that Judds' constitutional challenge to the trial courts post-trial reversal of its evidentiary rulings was without merit. (App., *infra*, 3). This ruling conflicts with the holding of the Second Circuit Court of

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[3] During the second day of trial, Burlington's counsel and the trial court engaged in the following discussion:

> MR. CONFER: Your Honor, if – if I may respond to the – the court's inquiry I think – I think that is the crux of the issue here. What is this January 22, 1990 letter? And it's our position, and I think that Exhibit 81 says this, that the terms of the settlement are in the January 16, 1990 letter, and I – that letter seems to me to be quite unambiguous as the court has pointed out . . .
>
> . . .
>
> THE COURT: Well, I'm looking at the pretrial conference because I think the pretrial order supersedes the pleadings, and if it's not in the trial order, it's not in the case anymore, and I think that's our rule here in Nebraska.

(App., *infra*, 231-232).

Appeals in the case of *Doubleday & Co. v. Curtis*, 763 F.2d 495 (2d Cir. 1985).

In that case, a publisher brought suit against an author for recovery of an advance it had paid, and the author counterclaimed for anticipated earnings. *Id.* at 496. After a bench trial, the district court dismissed both actions, ruling that the publisher had waived its right to a return of the advance, despite the fact that the issue of waiver had not been pled. *Id.* at 500, 502.

On appeal, the Second Circuit Court of Appeals reversed the district court's dismissal of the publisher's action because the issue of waiver had not been raised. The court stated that by basing its dismissal of the publisher's claim on an issue that had not been raised, the district court denied the publisher due process of law, writing:

> Among the cardinal principles of our Anglo-American system of justice is the notion that the legal parameters of a given dispute are framed by the positions advanced by the adversaries, and may not be expanded *sua sponte* by the trial judge. The dismissal of Doubleday's claim based on an issue never pleaded by Curtis – or even implicitly raised at trial – is inconsistent with the due process concerns of adequate notice and an opportunity to be heard.
>
> . . . .
>
> The fact that certain evidence relating to the issues raised in the pleadings and pretrial order may have been relevant to a defense of waiver is inconsequential. We have previously noted that neither notice nor consent can fairly be inferred

> from such circumstances. Accordingly, we conclude that, in dismissing the complaint on the basis of waiver, the District Court violated Doubleday's right to fair notice.

Id. at 502, 503. *See Jimenez v. Tuna Vessel "Granada"*, 652 F.2d 415, 421 (5th Cir. 1981) ("[T]he introduction of such evidence gave this defendant no fair notice that new issues were thereby entering the case, issues that it must meet or suffer an adverse judgment. Nor did the court give defendant any indication that it contemplated a decision on such grounds. . . . ") *See also, Lavender v. Kurn*, 327 U.S. 645 (1946).

By basing its decision to grant the Burlington's Motion for Judgment as a Matter of Law on issues not raised in the pleadings, in the pre-trial order, or at trial, and by reversing its evidentiary rulings after conclusion of the trial, thus preventing Judds from presenting evidence on these issues, the District Court denied Judds its right to a jury trial and to due process of law. The trial court's action in this matter is analogous to a court overruling a hearsay objection, and then granting a motion for judgment as a matter of law because the evidence presented was inadmissible hearsay. There are numerous exceptions to the hearsay rule, but by reversing its rulings after conclusion of a trial, a court deprives a litigant of the opportunity to present other evidence, or to prove up any of the hearsay exceptions. Similarly, by overruling the Burlington's parol evidence rule objections, and then granting Burlington's motion for judgment as a matter of law on the basis that the evidence presented by Judds was inadmissible pursuant to that rule and the statute of frauds, the trial court deprived Judds of the opportunity

to present other evidence of fraud, mistake, ambiguity, waiver, non-integration or any other exception to the parol evidence rule and the statute of frauds.

CONCLUSION

A manifest injustice has been levied against Judds Brothers. In this instance, the trial and appellate courts nullified the factual findings of a 12 member jury, and vacated that jury's verdict on the basis of affirmative defenses and "other matters constituting an avoidance or affirmative defenses" which were not set forth in the pre-trial order. Such judicial interference with our jury system should never be tolerated, condoned, or allowed to stand as precedent. If the Supreme Court of this land will not step in to correct a trial and appellate courts' abrogation of F.R.Civ.P. 8(c) and 16(e); abrogation of a litigant's due process right to have a jury determine the "facts" of the case; and abrogation of the JMAL standard of all Circuit Courts of Appeal, then there simply is no "rule of law" to protect the average civil litigant of this country.

Judds respectfully requests that its Petition for Certiorari be granted, the opinions below vacated, the appeal dismissed, and the case remanded for entry of judgment in Judds' favor, or at the very least for a hearing to offer evidence to the court why F.R.Civ.P. 8(c) and 16(e) should be enforced and why many of the numerous exceptions to

both the parol evidence rule and the statute of frauds are applicable in this action.

Respectfully submitted,

JUDDS BROTHERS CONSTRUCTION COMPANY, Petitioner

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November, 1999

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-2678NE

Burlington Northern Railroad Company, a Delaware Corporation,	*	
Appellee,	*	On Appeal from the United States District Court for the District of Nebraska.
v.	*	
Judds Brothers Construction Company, a Nebraska Corporation,	*	
Appellant.	*	

Submitted: April 21, 1999
Filed: July 9, 1999

Before RICHARD S. ARNOLD and WOLLMAN,[1] Circuit Judges, and WOLLE,[2] District Judge.

RICHARD S. ARNOLD, Circuit Judge.

Judds Brothers Construction Company prevailed at trial in this case and obtained a jury verdict for damages

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[1] The Honorable Roger L. Wollman became Chief Judge of this Court on April 24, 1999.

[2] The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa, sitting by designation.

on its counterclaim for breach of contract against Burlington Northern Railroad Company. The District Court[3] granted Burlington Northern's motion for judgment as a matter of law and vacated the jury verdict. Judds Brothers appeals, and we affirm.

Judds Brothers' counterclaim was based on a written settlement agreement it entered into with Burlington Northern that resolved a dispute over a construction project Judds performed at one of Burlington's facilities. According to Judds, as part of the settlement Burlington agreed to reinstate Judds as a supplier of construction services and allow Judds to bid on all of Burlington's future construction projects which Judds could feasibly perform. In addition, Judds contends that Burlington agreed that if Judds was the low bidder on any of these projects, then it would be awarded the contract. Judds claims that Burlington broke this agreement when it failed to allow Judds to bid on several projects and also refused to award Judds two contracts on which it was the low bidder.

It is undisputed that nothing in the written agreement can be construed as providing for the terms Judds alleges.[4] At trial, Judds attempted to supplement the

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[3] The Hon. Lyle E. Strom, United States District Judge for the District of Nebraska.

[4] The agreement states only that Burlington would write "a letter indicating that the litigation here resulted from a misunderstanding between the parties and that the controversy has been resolved to the mutual satisfaction of Burlington Northern and Judds Brothers." The letter, which was written shortly after the agreement was signed, was addressed "To

written agreement with extrinsic evidence of these additional terms. After hearing all of the evidence, the District Court held that the written agreement was the only competent evidence of the terms of the settlement, and concluded that Burlington was entitled to judgment as matter of law.

Most of the arguments urged on appeal involve the application of general principles of Nebraska contract law. These issues were ably addressed by the District Court's memorandum opinion, and we see no reason to undertake a protracted discussion on the subject. As for the appellant's constitutional challenge and any other arguments not addressed by the District Court's opinion, we have thoroughly examined the record and the transcripts and find these issues to be without merit.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Whom It May Concern:" and states that "Judds Brothers Construction continues to be a supplier of construction services to the Burlington Northern Railroad. Judds has also provided tie rehabilitation service to the Burlington Northern since 1987."

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, v. JUDDS BROS. CONSTRUCTION COMPANY, Defendant.	4:CV95-3113 ORDER AND JUDGMENT

Pursuant to the memorandum opinion entered herein this date,

IT IS ORDERED:

1) Defendant Burlington Northern Santa Fe Railway's motion for judgment as a matter of law (Filing No. 66) is granted.

2) The jury verdict (Filing No. 61) and the judgment entered thereon (Filing No. 64) are vacated.

3) Plaintiff Judds Brother Construction Company's counterclaims are dismissed.

DATED this 3rd day of June, 1998.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, v. JUDDS BROS. CONSTRUCTION COMPANY, Defendant.	4:CV95-3113 MEMORANDUM OPINION

This matter is before the Court on plaintiff, Burlington Northern Santa Fe Railway's (Burlington), motion for judgment as a matter of law, or in the alternative, for a new trial (Filing No. 66). The plaintiff's claim was settled prior to trial. Defendant, Judds Brothers Construction Company's (Judds) counterclaim was tried to a jury. On April 7, 1998, the jury found for the defendant and awarded it $791,232.05 in damages. Judgment on the verdict was entered on April 10, 1998 (Filing No. 64). For the reasons set forth below, Burlington's motion for judgment as a matter of law is granted and the jury's verdict is set aside.

I. BACKGROUND

Burlington operates an interstate railroad with facilities in Nebraska. Judds is a general contractor that has

performed various services for Burlington. In 1987, Burlington contracted with Judds to perform a construction project at Burlington's Gibson Yards facility in Omaha, Nebraska. A dispute arose between the parties regarding the quality of certain aspects of the project and litigation followed. On January 16, 1990, Judds' president, Ray Judds, met with William Glavin, Burlington's System Chief Engineer, and agreed to settle the dispute. The parties signed a letter agreement. Exhibit 81, memorializing the settlement.[1] The settlement agreement terms were

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[1] Exhibit 81 is a letter dated January 16, 1990, that states as follows:

> This will confirm an understanding you and I reached today to settle all litigation arising out of the construction of the Gibson Yard intermodal facility at Omaha, Nebraska. (sic) It is agreed as follows:
>
> A) Burlington Northern will satisfy all outstanding claims for materials furnished for this job. Consolidated Mixing will be paid in the full amount outstanding (approximately $87,000.00).
>
> B) Burlington Northern will pay Judds Brothers the sum of $250,000.00.
>
> C) All claims are released and all litigation dismissed in any way arising out of the project without further cost or expense to either party. The lawyers will take the action necessary to accomplish this.
>
> D) I will write you a letter indicating that the litigation here resulted from a misunderstanding between the parties and that the controversy has been resolved to the mutual satisfaction of Burlington Northern and Judds Brothers.
>
> E) Representatives of both parties will keep the settlement terms strictly confidential.

to be kept confidential and the letter agreement required Burlington to write an additional letter for Judds to show to its bonding company and creditors indicating that the litigation had been settled to the mutual satisfaction of both parties. The following week, Burlington wrote the letter, Exhibit 85, and delivered it to Judds.[2]

Judds alleges that Burlington agreed as part of the settlement agreement to reinstate Judds as a supplier of construction services. Judds claims that as such a supplier, it would be given the opportunity to bid on all

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If the above terms are acceptable to Judds Brother, please indicate by signing on the line below and returning one copy to me.

Yours very truly,

/s/ William E. Glavin /s/ Ray Judds

[2] Exhibit 85, dated January 22, 1990, states as follows:

TO WHOM IT MAY CONCERN:

Please be advised that all litigation surrounding the Intermodal Hub Construction Project at Burlington Northern's Gibson Yards in Omaha, Nebraska, has been settled to the satisfaction of the parties. The lawsuits associated with this project arose from a misunderstanding of properties and capabilities of Roller Compacted Concrete; specifically in conjunction with adverse subgrade moisture conditions.

Judds Brothers Construction continues to be a supplier of construction services to the Burlington Northern Railroad. Judds has also provided tie rehabilitation service to the Burlington Northern since 1987.

Sincerely,

/s/ William Glavin

Burlington construction projects it could feasibly perform, and if Judds was the low bidder, it would be awarded the contract for the project. In its counterclaim, Judds alleges that Burlington breached the settlement agreement by not giving Judds the opportunity to bid on all Burlington construction projects Judds was capable of performing and by not awarding it the contract for two projects for which Judds submitted the lowest bid.

Burlington denies that it agreed to give Judds the opportunity to bid on all Burlington projects Judds was capable of performing and denies that it guaranteed to award Judds any contract on which Judds was the low bidder. Burlington asserted throughout trial that Exhibits 81 and 85 were unambiguous and objected to the admission of parole evidence.

II. DISCUSSION

Fed. R. Civ. P. 50, provides that the Court may grant a motion for judgment as a matter of law against a party if there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party. In ruling on such a motion, the Court must resolve all evidentiary conflicts in favor of the non-moving party. *BE & K Constr. Co. v. United Brotherhood of Carpenters & Joiners*, 90 F.3d 1318, 1326 (8th Cir. 1996). Further, Fed. R. Civ. P. 50(b) states:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant

> may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under Rule 59.

Burlington moved for judgment as a matter of law at trial and renews its request for judgment on the basis that there is no legally sufficient evidence to support any claim against it. Burlington essentially makes two arguments. First, it reasserts its argument that Exhibits 81 and 85 are unambiguous and, as a result, any parol evidence or evidence of an oral agreement is inadmissible. Second, Burlington claims Judds failed to prove damages with the level of certainty required by Nebraska law. In response, Judds argues that Burlington waived the right to renew its motion for judgment as a matter of law because it failed to make such a motion at the close of all of the evidence. Judds also asserts that the Court properly admitted extrinsic evidence of the settlement agreement and that there was sufficient evidence to establish damages.

A. Waiver

At the end of Judds' case, Burlington moved for judgment as a matter of law. Burlington renewed this motion at the end of its case, at which time the Court took the motion under advisement. For rebuttal, Judds did not present any additional witness testimony, however they offered five exhibits. The Court received two exhibits into evidence immediately. With respect to the remaining three, the Court needed time to review the exhibits and

reserved ruling on them. At the jury instruction conference, the Court ruled that the three exhibits were improper rebuttal and as such were inadmissible. Burlington did not formally renew its motion at that time; however, it made objections to the jury instructions that were consistent with its motion for directed verdict.

Generally, "if a party does not move for judgment as a matter of law at the close of all the evidence, it normally cannot later argue that there was insufficient evidence to support the verdict." *Id.* at 1326 citing *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 655 (8th Cir. 1995). However, there are exceptions to the rule. *Id.* at 1325. In *BE & K*, the Eighth Circuit pointed out that an exception is recognized when

> 1) the district court defers ruling on the motion, 2) no evidence related to the claim comes in after the motion, and 3) very little time passes between the motion and the close of the evidence.

Id. (internal citations omitted).

This case clearly falls within this exception. When Burlington renewed its motion at the end of its case, the Court reserved ruling on the motion. Judds' entire rebuttal took a matter of minutes and was no more than the admission of two exhibits without any further testimony. One of the exhibits was an extract of an earlier exhibit that had already been published and the other was a document admitted to show the potential interest of two of Burlington's witnesses. Thus, the Court finds Burlington's Rule 50(b) motion is properly before it.

B. Extrinsic Evidence

Burlington has consistently argued that the admission of extrinsic evidence was improper, and that without such evidence, there was no legally sufficient evidence to support Judds' claim. Under Nebraska law, settlement agreements are subject to the general principles of contract law. *Woodmen of the World Life Ins. Soc'y v. Knight*, 46 Neb. 619, 522 N.W.2d 155 (1994); *Heese Produce Co. v. Lueders*, 233 Neb. 12, 18, 443 N.W.2d 278, 282 (1989). Parol evidence is not admissible when a contract is unambiguous, rather, the parties intent must be determined from the contents of the contract itself. *Krzycki v. Genoa Nat'l Bank*, 242 Neb. 819, 826, 496 N.W.2d 916, 921 (1993). A contract is ambiguous "if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings." *Id.* However, "[t]he fact that parties to a document have or suggest opposing interpretation of the [contract] does not necessarily, or by itself, compel the conclusion that the [contract] is ambiguous." *Id.* Finally, "[t]he meaning of an unambiguous contract is a matter of law." *Kropp v. Grand Island Pub. Sch. Dist.*, 246 Neb. 138, 141-2, 517 N.W. 2d 113, 115 (1994).

Applying these principles, the Court finds, as a matter of law, that there is no ambiguity in the language of Exhibits 81 or 85. The parties agreed to the settlement terms contained in paragraphs A through E of Exhibit 81. None of these paragraphs contain any language regarding a promise by Burlington that Judds would be allowed to bid on all Burlington construction projects Judds could feasibly perform or that Judds would automatically be awarded a contract if it was the low bidder on a project.

Exhibit 85 is the letter Burlington agreed to write pursuant to paragraph D of Exhibit 81. Exhibit 85 is not part of the contents of the contract. Rather, it is evidence of performance of the agreement. Regardless, nothing in Exhibit 85 indicates Burlington made the promises Judds alleges. Thus, there is no written agreement containing the terms Judds alleges.

Judds also argues that the parties entered into a series of agreements during their January 16, 1990, negotiations that included an oral or implied agreement by Burlington to allow Judds to bid on all construction projects Judds could feasibly perform and award it the contract if it was the low bidder on a project. This argument is contrary to the well established principle that "[w]here negotiations between parties result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity. *Rowe v. Allely*, 244 Neb. 484, 486, 507 NW.2d 293, 296 (1993), *see also Schommer v. Bergfield*, 178 Neb. 140, 132 N.W.2d 1345 (1965). The first paragraph of Exhibit 81 states that the letter is to confirm the agreement the parties reached and in effect reduce it to writing. Judds did not allege or offer any evidence of fraud or mistake and, as stated above, there is no ambiguity. Thus, any evidence of an oral or implied agreement is inadmissible.

Furthermore, even if there was sufficient evidence to establish an oral or implied contract, the contract would be unenforceable under the Nebraska Statute of Frauds. Neb. Rev Stat. § 36-202 (Reissue 1993) provides:

> In the following cases every agreement shall be void, unless such agreement or note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith:
>
> (1) Every agreement that, by its terms, is not to be performed within one year from the making thereof;
>
> . . .

The oral contract was to begin on January 16, 1990, and continue for a period exceeding one year. Thus, the Statute of frauds would render the contract void. However, Nebraska law provides that an oral contract may still be enforced "if there is a written memorandum of the agreement sufficient to take the contract out of the Statute of Frauds." *Ancom, Inc. v. E.R. Squibb & Sons, Inc.*, 658 F.2d 650, 651-52 (1981). While the written memorandum does not have to contain "the terms and conditions of all the promises constituting the contract," it must include all of the "essential" or "integral" terms in order to be enforceable. *Id.*

Exhibits 81 and 85 do not contain all or even any of the essential terms of the alleged oral agreement. First, they do not indicate that Judds must be given the opportunity to bid on all Burlington projects it was capable of performing. This is an integral term in light of the fact that Burlington did invite Judds to bid on some of the projects Burlington thought Judds was capable of performing. Second, there is no language in the exhibits requiring Burlington to award Judds the contract on projects on which it was the low bidder. Generally, when a corporation requests bids for construction projects, it is not obligated to accept the low bid. *See* 17 C.J.S. Contracts

§ 48. In its invitations to bid. Burlington reserved the right to award the bid to a contractor other than the low bidder. Thus, the requirement that Judds be awarded the contract if they were the low bidder is crucial, because without it, Judds had no independent right to be awarded any contract if it was the low bidder. Finally, the duration of the agreement is an essential element, and no such term is contained in any document. Without such term, Burlington's obligation could continue *ad infinitum*.

CONCLUSION

For the foregoing reasons, the Court finds that Burlington is entitled to judgment as a matter of law.[3] A separate order will be entered in accordance with this opinion.

DATED this 3rd day of June, 1998.

BY THE COURT:

/s/ Lyle E Strom
LYLE E. STROM, Senior Judge
United States District Court

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[3] Having found that Burlington is entitled to judgment as a matter of law, it is unnecessary to address Burlington's damages argument.

TERMED APPEAL

U.S. District Court
U.S. District Court for the District of Nebraska (Lincoln)

CIVIL DOCKET FOR CASE #: 95-CV-3113

BNRR v. Atlas Company, et al
Assigned to: Judge Lyle E. Strom
Demand: $0,000
Lead Docket: None
Dkt # in USDC-CO : is 95N186

Filed: 03/27/95
Jury demand: Defendant
Nature of Suit: 140
Jurisdiction: Diversity

Cause: 28:1332 Diversity-Negotiable Instrument

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation,

plaintiff

Rodney M. Confer
[COR LD NTC ret]
KNUDSEN, BERKHEIMER LAW FIRM
1000 NBC Center
1248 O Street
Lincoln, NE 68508
(402) 475-7011

Walter J. Downing
[COR LD NTC]
KNUDSEN, BERKHEIMER LAW FIRM
1401 17th Street
Suite 510
Denver, CO 80202
(303) 295-4250
FTS 295-4243

v.

ATLAS COMPANY OF LINCOLN, Nebraska corporation defendant	William G. Dittrick [COR LD NTC] BAIRD, HOLM LAW FIRM 1500 Woodmen Tower Omaha, NE 68102-2068 (402) 344-0500 FTS 344-0588 Dean F. Suing [COR LD NTC ret] KATSKEE, HENATSCH LAW FIRM 10404 Essex Court Suite 100 Omaha, NE 68114 (402) 391-1697
JUDDS BROTHERS CONSTRUCTION COMPANY, Nebraska corporation defendant	
----------	Dean F. Suing (See above)
ATLAS COMPANY OF LINCOLN, Nebraska corporation counter-claimant	
JUDDS BROTHERS CONSTRUCTION COMPANY, Nebraska Corporation counter-claimant	
v.	
BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation counter-defendant	

METRO MEDIATION CENTER mediator [term 07/15/97]	Metro Mediation Center [term 07/15/97] [COR LD NTC] [PRO SE] 2522 North 24th Omaha, NE 68110 (402) 444-1970
ATLAS COMPANY OF LINCOLN counter-claimant	William G. Dittrick [COR LD NTC] BAIRD, HOLM LAW FIRM 1500 Woodmen Tower Omaha, NE 68102-2068 (402) 344-0500 FTS 344-0588 Dean F. Suing [COR LD NTC ret] KATSKEE, HENATSCH LAW FIRM 10404 Essex Court Suite 100 Omaha, NE 68114 (402) 391-1697
v.	
BURLINGTON NORTHERN RAILROAD COMPANY counter-defendant	Walter J. Downing [COR LD NTC] KNUDSEN, BERKHEIMER LAW FIRM 1401 17th Street Suite 510 Denver, CO 80202 (303) 295-4250 FTS 295-4243

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation,

plaintiff

v.

ATLAS COMPANY OF LINCOLN, Nebraska corporation; JUDDS BROTHERS CONSTRUCTION COMPANY, Nebraska corporation

defendant

ATLAS COMPANY OF LINCOLN, Nebraska corporation; JUDDS BROTHERS CONSTRUCTION COMPANY, Nebraska Corporation;

counter-claimant

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation

counter-defendant

METRO MEDIATION CENTER

mediator

ATLAS COMPANY OF LINCOLN,

counter-claimant

BURLINGTON NORTHERN RAILROAD COMPANY

counter-defendant

3/27/95	1	ORDER by Magistrate Judge O. Edward Schlatter transferring case from Colorado to the District of Nebraska with original pldgs received from U.S. District of Colorado consisting of 18 pldgs and certified copy of order #19 per docket sheets attached – Letter notice of transfer sent to counsel of record on 3/29/95 (ccb) [Entry date 03/28/99]
4/5/95	2	ATTORNEY APPEARANCE for defendant and counter-claimant Atlas Company; atty Dean F. Suing (ccb)
4/12/95	3	ORDER by Magistrate David L. Piester grt P's mot for def stmt (fil 16 in orig file); ddl for amended counterclaim set for 10 days – CCAP (jfm)
4/12/95	4	SCEDULING PACKET by Magistrate David L. Piester. CCAP w packet. (knn) [Entry date 04/13/95]
5/10/95	5	ANSWER and AMENDED COUNTERCLAIM; jury demand by defendant Atlas Company against plaintiff BNRR (etc)

6/6/95	6	PROGRESSION/SCHEDULING ORDER Magistrate David L. Piester; Discovery set for 3/27/96; pretrial conf set for 9:00 4/10/96 before Magistrate David L. Piester; jury trial set for 5/96 sessn (with report of planning meeting attch'd) – CCAP (knn) [Entry date 06/07/95]
11/27/95	7	MOTION (Stipulation) by plaintiff, defendants to dismiss (ccb) [Entry date 11/28/95]
11/29/95	8	ORDER by Judge Richard G. Kopf granting stipulation to dismiss [7-1] dismissing plf's complaint only and further proceedings be had with regard to amend counterclaim of dfts – COPIES MAILED (ccb) [Edit date 05/16/97]
2/29/96	9	MOTION by defendant Judds Brothers, defendant Atlas Company to extend pretrial progression order (plw) [Entry date 03/01/96]
3/1/96	–	TRANSMITTAL of documents [9-1] to Lincoln Clk's office plw
3/25/96	10	ORDER by Magistrate David L. Piester granting dfts' motion to extend pretrial progression order [9-1]; Discovery set for 5/17/96; Pretrial conference will be held 5/24/96 at 12:15 p.m.; Jury trial is set to commence at 9:00 a.m. at 6/10/96 for 5 days, jury selection will be held at commencement of trial – COPIES MAILED (ccb)

4/3/96	11	CERTIFICATE of service by plaintiff BNRR of first set of interrogs and reqs for production and a copy of this certif (ccb)
4/23/96	12	ANSWER TO COUNTERCLAIM [5-2] by counter-defendant BNRR (jfm) [Entry date 04/24/96]
5/3/96	13	REPLY by defendant Judds Brothers to Plf's "Reply to Counterclaim" (Answer) [12-1] (plw)
5/3/96	–	TRANSMITTAL of documents [13-1] to Lincoln Clk's office (plw)
5/7/96	14	CERTIFICATE of service by plaintiff BNRR of answers to dft's first set of interrogs and plf's resps to dft's reqs for production of docs (ccb) [Entry date 05/08/96]
5/7/96	15	MOTION by plaintiff BNRR to continue progression (ccb) [Entry date 05/08/96]
5/8/96	16	NOTICE by defendants of consent to plf's motion for continuance of progression (ccb) [Entry date 05/09/96]
5/10/96	17	ORDER by Magistrate David L. Piester granting motion to continue progression [15-1]; Discovery set for 9/17/96; Pretrial conference set 9/18/96 at 10:00 a.m.; Jury trial is contd to October, 1996. – COPIES MAILED (ccb)

5/20/96	18	CERTIFICATE OF SERVICE by plaintiff BNRR of Plf's Supplemental Disclosures. (jlr)
8/21/96	19	MEMORANDUM AND ORDER: by Magistrate Judge David L. Piester that parties shall report to the court in accordance with the progression order w/i 10 days - COPIES MAILED (ccb)
9/13/96	20	MOTION by defendant Judds Brothers, defendant Atlas Company for extension & continuance of pretrial conference & deadlines and for order of mediation (plw)
9/18/96	21	MEDIATION REFERENCE ORDER by Magistrate Judge David L. Piester - case is referred to MMC - objection to this order shall be submitted w/in 7 working days; case is stayed until further order of the court. COPIES MAILED (knn)
11/26/96	22	MOTION by plaintiff, defendants to extend time to complete mediation (ccb) [Entry date 11/27/96]
12/2/96	23	ORDER by Magistrate Judge David L. Piester granting motion to extend time to complete mediation to 1/17/97 [22-1], [20-1] - COPIES MAILED (ccb)
1/29/97	24	MOTION by plaintiff, defendants to continue mediation reference order to 4/22/97 (ccb)

1/29/97	25	ORDER by Magistrate Judge David L. Piester granting stipulated motion to continue mediation reference order to 4/22/97 [24-1] – COPIES MAILED (ccb)
6/25/97	26	MOTION by plaintiff BNRR to establish progression schedule (jlr) [Entry date 06/27/97]
7/15/97	27	MEDIATION CLOSURE NOTICE by Metro Mediation Center; mediation scheduled on 1/17/97 and cont for a second session on 2/3/97; no agreement (jlr) [Entry date 07/16/97]
7/21/97	28	ORDER by Magistrate Judge David L. Piester; Discovery set for 11/26/97; Pretrial conference will be held 12/10/97 at 3:00 p.m.; Jury trial is cont to 1/98 jury session – COPIES MAILED (jlr)
10/30/97	29	ORDER by Chief Judge William G. Cambridge Case reassigned to Judge Lyle E. Strom; Magistrate Judge Piester shall continue as the Magistrate Judge assigned to handle pretrial matters as referred to him by Judge Strom – COPIES MAILED (etc)
10/30/97	–	TRANSMITTAL of documents [29-1] to Lincoln. (etc)
11/5/97	–	FILE SENT to Omaha (ccb)

11/12/97	30	NOTICE by defendant Atlas Company, defendant Judds Brothers of taking deposition of William Glavin, Jack Moy, Trent Hudak, Jerry Helms and Gerald Albin on November 24, 25 and 26 1997 (tls)
12/4/97	–	FILE SENT to Lincoln clerk's office for Magistrate Judge Piester (gjh)
12/11/97	31	PRE-TRIAL ORDER by Magistrate Judge David L. Piester: PTC held; jury trial set at court's call for 2/98 estimated length of trial 5 days – COPIES MAILED (jfm)
12/11/97	–	FILE SENT to Omaha (jfm)
1/23/98	32	AMENDMENT TO EXHIBIT LIST; with amendments attached (jlr)
1/26/98	33	ORDER by Judge Lyle E. Strom Jury trial is set for 3/30 98 at 9:00 a.m. – COPIES MAILED (tls)
1/27/98	–	TRANSMITTAL of documents [32-1] to Omaha (jlr)
2/5/98	34	CERTIFICATE by court reporter of taking depo of Jack D. Moy on 1/16/98 (jlr) [Edit date 02/06/98]
2/5/98	35	CERTIFICATE by court reporter of taking depo of Patrick Barclay on 1/16/98 at 10:00 a.m. (jlr)
2/5/98	–	TRANSMITTAL of documents [35-1], [34-1] to Omaha (jlr)
2/17/98	36	CERTIFICATE by court reporter of taking the depo of Kevin Steele (tls) [Entry date 02/23/98]

2/26/98	37	CERTIFICATE by court reporter of taking the depo of Trent M. Hudak (tls) [Entry date 02/27/98]
3/2/98	39	CERTIFICATE by court reporter of taking depo of Ray E. Judds on 1/26/98 (jlr) [Entry date 03/10/98]
3/2/98	40	CERTIFICATE by court reporter of taking depo of William E. Glavin on 1/26/98 (jlr) [Entry date 03/10/98]
3/2/98	41	CERTIFICATE by court reporter of taking depo of John R. Judds on 1/27/98 (jlr) [Entry date 03/10/98]
3/6/98	38	Amendment to EXHIBIT LIST by defendant Judds Brothers (knn) [Entry date 03/09/98]
3/13/98	42	Amendment to EXHIBIT LIST by defendant Judds Brothers (knn)
3/20/98	43	NOTICE by defendant Judds Brothers of designation of deposition testimony of dft Judds Brothers Construction Company (jlr)
3/23/98	44	NOTICE by plaintiff BNRR of designation of deposition testimony of BNRR Company (jlr) [Entry date 03/24/98]
3/23/98	45	OBJECTION by plaintiff BNRR to depo testimony and counter designations (jlr) [Entry date 03/24/98]
3/26/98	46	AMENDMENT TO EXHIBIT LIST by defendant Judds Brothers, counter-claimant Judds Brothers (cjc)

3/26/98	47	MOTION by plaintiff BNRR in limine, with attachments (knn)
3/26/98	48	AFFIDAVIT of Coray L. Stull in support of plf's motion in limine [47-1] (knn)
3/27/98	49	JURY INSTRUCTIONS submitted by plaintiff BNRR (jlr) [Entry date 03/30/98]
3/27/98	50	MOTION by plaintiff BNRR in limine requests the court to order dft's cnsl to instruct his witnesses to make no reference in regard to lawsuit involving Gibson Yards and BNSF's lawsuit to recover indemnification (jlr) [Entry date 03/30/98]
3/30/98	51	PROPOSED JURY INSTRUCTIONS (Set I) submitted by defendant Atlas Company, defendant Judds Brothers (jlr) [Entry date 03/31/98]
3/31/98	52	MINUTES: before Judge Lyle E. Strom – Court Reporter: Rogene S. Schroder court trial began; jury empaneled; opening stmts; evidence by plf and dft; trial not concluded – cont to 3/31/98 at 9:00 a.m.; oral motion by dft to sequester witnesses is granted; no written order forthcoming terminating magistrate referral (jlr) [Edit date 04/09/98]
3/31/98	53	JURY PANEL RECORD (jlr)

3/31/98	54	MINUTES: before Judge Lyle E. Strom – Court Reporter: Rogene S. Schroder, civil trial resumed; evidence by plf and dft; trial not concluded – cont to 4/1/98 at 9:00 a.m. (jlr) [Entry date 04/01/98]
4/1/98	55	MINUTES: before Judge Lyle E. Strom – Court Reporter: Rogene S. Schroder; civil trial resumed; evidence by Plf; trial not concluded – continued to 4/2/98 at 9:00 a.m. (cjc) [Entry date 04/02/98] [Edit date 04/07/98]
4/2/98	56	MINUTES: before Judge Lyle E. Strom – Court Reporter: Rogene S. Schroder; civil trial resumed; evidence by Plf and Dft; Plf rests; trial not concluded – continued to 4/3/98 at 9:00 a.m.; oral motion by Dft for a directed verdict or in the alternative, judgment as a matter of law is over-ruled; no written order forthcoming (cjc) [Entry date 04/03/98]
4/3/98	58	MINUTES: before Judge Lyle E. Strom – Court Reporter: Rogene S. Schroder; civil trial resumed; evidence by Dft; trial not concluded – continued to 4/6/98 at 11:00 a.m.; oral motion by Dft for a directed verdict or in the alternative, judgment as a matter of law is overruled; no written order forthcoming (cjc) [Entry date 04/06/98] [Edit date 04/08/98]

4/6/98	57	PROPOSED JURY INSTRUCTIONS submitted by defendant Judds Brothers (Set II) (cjc)
4/7/98	59	MINUTES – 4/6/98: before Judge Lyle E. Strom – Court Reporter: Rogene S. Schroder; trial resumed; evidence by dft dft rests; closing arguments; instruction conference; jury received case 4:35; jury returned 5:15 w/out verdict; it is ordered to resume deliberations on 4/7/98 9:00; civil trial ended; 6 days of trial w/evidence (kqp) [Edit date 04/08/98]
4/7/98	60	COURT'S CHARGE TO JURY (ccb)
4/7/98	61	VERDICT for counter-claimant Judds Brothers against counter-defendant BNRR (kqp) [Entry date 04/08/98]
4/8/98	62	MINUTES: before Judge Lyle E. Strom jury resumed deliberations on 4/7/98 at 9:00 a.m., verdict received at 4:00 p.m. for plf, clerk to file verdict, but w/hold entry of jgm until further order (tls)
4/8/98	63	EXHIBIT LIST from hearing held on 3/30/98 to 4/6/98 (tls)
4/10/98	64	JUDGMENT by Clerk jgm is entered in favor of the plf and against the dft in the amount of $791,232.05 together with the plf's costs herein – COPIES MAILED (tls) [Entry date 04/13/98]

4/15/98	65	MOTION by plaintiff BNRR to stay execution of judgment pending disposition of its mtn for judgment and alternative mtn for a new trial (kqp)
4/15/98	66	MOTION by plaintiff BNRR for judgment as a matter of law, or in the alternative for new trial (kqp)
4/17/98	67	BILL OF COSTS submitted by defendant Judds Brothers re judgment [64-3] (tls) [Entry date 04/20/98]
4/20/98	68	NOTICE by defendant Judds Brothers of telephonic hrg re: costs (tls) [Entry date 04/21/98]
4/21/98	69	ORDER by Judge Lyle E. Strom the court being duly advised in the premises, is hereby ordered that execution of the jgm and any proceedings to enforce the jgm are hereby stayed pending disposition of the dft's post-trial mtns and that dft shall not be required to post any security pending resolution of dft's post-trial mtns – COPIES MAILED (tls) [Entry date 04/22/98]
4/24/98	70	MOTION by plaintiff BNRR, counter-defendant BNRR, counter-defendant BNRR for leave to submit a reply brief on mtn for a judgment as a matter of law (kqp) [Entry date 04/27/98]

4/27/98	71	ORDER by Judge Lyle E. Strom granting motion for leave to submit a reply brief on mtn for a judgment as a matter of law [70-1] – COPIES MAILED (tls) [Entry date 04/28/98]
5/4/98	72	WITNESS LIST from hearing held on March 30, 31, April 1, 2, 3, 6, 1998. (cjs)
5/20/98	73	BILL OF COSTS submitted by defendant Judds Brothers re judgment [64-3] (tls)
6/4/98	74	MEMORANDUM OPINION: by Judge Lyle E. Strom the court finds that Burlington is entitled to jgm as a matter of law. A separate order will be entered in accordance with this opinion – COPIES MAILED (tls)
6/4/98	75	JUDGMENT by Judge Lyle E. Strom granting motion for judgment as a matter of law [66-1], the jury verdict [61-1] and the jgm entered thereon [64-3] are vacated and plf Judds Brother Construction Company's counterclaims are dismissed – COPIES MAILED (tls) [Entry date 06/05/98]
6/19/98	76	NOTICE OF APPEAL by defendant Judds Brothers from District Court Memorandum Opinion [74-1] and Judgment [75-1] – COPIES MAILED (lfs) [Entry date 06/22/98]

6/19/98	–	RECEIPT for Appeal fee from defendant Judds Brothers in the amount of $ 105.00 (Receipt #81116) re: notice of appeal [76-1] (lfs) [Entry date 06/22/98]
6/19/98	77	REQUEST FOR TRANSCRIPT by defendant Judds Brothers for all parts of the trial not already on file – cc: Court Reporter, Rogene Schroder (lfs) [Entry date 06/22/98]
6/19/98	78	PROOF OF SERVICE by defendant Judds Brothers of serving a copy of Appellant's Form A with attachment (Partial List of Issues on Appeal), an original of Appellee's Form B, and a copy of the Notice of Appeal (lfs) [Entry date 06/22/98]
6/19/98	79	APPELLANT'S DESIGNATION OF EXHIBITS by defendant and counter-claimant Judds Brothers purssuant to 8th Circuit R. App. P. 30A(B)(5) (lfs) [Entry date 06/23/98] [Edit date 06/23/98]
6/23/98	80	2 CERTIFIED COPIES of notice of appeal [76-1], memorandum opinion [74-1], order and judgment [75-1], judgment [64-3], verdict [61-1] and clerk's docket entries mailed to Clerk, USCA 8th Circuit; docket entries also mailed to attys of record (lfs) [Edit date 06/23/98]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 95-N-186

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation,

Plaintiff,

vs.

ATLAS COMPANY OF LINCOLN, a Nebraska corporation,

Defendant,

and

JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska corporation,

Defendant,

NOTICE OF REMOVAL PURSUANT TO 28 U.S.C. 1441 and CERTIFICATE OF SERVICE

(Filed Jan. 25, 1995)

Defendants, Atlas Company Of Lincoln, and Judds Brothers Construction Company, by and through their attorneys Robert B. Douglas & Associates, file their Notice of Removal Pursuant to 28 U.S.C. 1441 as follows:

BASIS FOR REMOVAL

1. The Plaintiff is a Delaware corporation.

2. Defendants are Nebraska corporations with their place of principal business in the state of Nebraska.

3. The amount in controversy, excluding interest and costs, exceeds the sum or value of Fifty Thousand Dollars ($50,000.00).

STATE COURT ACTION PARTICULARS

4. The Plaintiff filed its complaint against the Defendants on January 5, 1995 in the Denver District Court, State of Colorado as Civil Action No. '95 CV 36.

5. Defendants have not answered nor filed any pleading in the state court action.

6. A copy of all pleadings and orders filed with the state court and served on the Defendants is attached as Exhibit A.

Respectfully submitted,

ROBERT B. DOUGLAS & ASSOC.

/s/ Robert B. Douglas
Robert B. Douglas, #14492
4949 S. Syracuse St., Suite 400
Denver, Colorado 80237
(303) 721-8180

Attorneys for Defendants
Atlas Company of Lincoln and
Judds Brothers

Defendants' address:

P.O. Box 5344
3835 N. 68th Street
Lincoln, NE 68505
(402) 467-4666

EXHIBIT A

DISTRICT COURT CITY AND COUNTY OF DENVER, COLORADO
CASE NO. 95CV36 div/CtRm ___

SUMMONS

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff	ATLAS COMPANY OF LINCOLN and JUDDS BROTHERS CONSTRUCTION COMPANY, INC., Defendant

v.

The People of the State of Colorado
To the Defendant(s) named above:

You are summoned and required to file with the clerk of this court an answer or other response to the attached complaint within twenty (20) days after this summons is served on you in the State of Colorado, or within thirty (30) days after this summons is served on you outside the State of Colorado.

If you fail to file your answer or other response to the complaint in writing within the applicable time period, judgment by default may be entered against you by the court for the relief demanded in the complaint, without any further notice to you.

The following documents are also served with this summons: Complaint

Date: Jan. 4, 1994

KNUDSEN, BERKHEIMER, RICHARDSON & ENDACOTT
By: /s/ Walter J. Downing
Signature of Attorney for Plaintiff or Clerk Deputy Clerk in Court
If issued by attorney, type: Name, address, tel. & illegible

Walter J. Downing, #11257
1401 – 17th Street, Suite 510
Denver, CO 80202
(303) 295-4250

This summons is issued pursuant to Rule 4, CRCP, as amended. A copy of the complaint must be served with this summons.

RETURN OF SERVICE

State of _____

County of _____

I declare under oath that I served this summons and a copy of the complaint in this case on _____ in _____ County _____, on _____ at ____ (Time) at the following location:

[ ] by handing it to a person identified to me as the defendant.

[ ] by leaving it with the defendant who refused service.

[ ] by leaving it with _____ designated to receive service for the defendant.

[ ] I am over the age of 18 years and am not interested in nor a party to this case.

[ ] I attempted to serve the defendant on ____ occasions but have not been able to locate the defendant.

Return to the plaintiff is made on _____ (Date).

Subscribed and sworn to before me this ____ day of _____, 19____ in _____ County, State of _____.

_____
Notary Public*

_____
Date
[ ] Private process server
[ ] Sheriff, _____
County
Service $ _____
Mileage $ _____

_____

_____

* Notary should include address and expiration date of commission.

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

CIVIL ACTION NO. '95 CV 36 COURTROOM 14

COMPLAINT

(Filed Jan. 5, 1995)

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation,

Plaintiff,

v.

ATLAS COMPANY OF LINCOLN and JUDDS BROTHERS CONSTRUCTION COMPANY, INC., Nebraska corporations,

Defendants.

Burlington Northern Railroad Company, ("Burlington Northern") by and through its attorneys, Knudsen, Berkheimer, Richardson & Endacott, for its Complaint against Atlas Company of Lincoln ("Atlas") and Judds Brothers Construction Company ("Judds Brothers"), states and alleges as follows:

1. Burlington Northern is a Delaware corporation and an interstate railroad with trackage in the City and County of Denver, among other places.

2. Atlas has merged into Judds Brothers, and Judds Brothers is a Nebraska corporation with a principal place of business at Lincoln, Nebraska.

3. Venue is proper in this county in that the contract upon which this claim is brought was to be and was performed in Denver, Colorado and the negligence of Defendants upon which Burlington Northern bases its claim for contractual indemnification from Atlas and Judds Brothers occurred at Denver, Colorado.

4. On or about January, 1987, Burlington Northern, Judds Brothers and Atlas entered into an Agreement whereby Burlington Northern agreed to provide and furnish to Atlas and Judds certain used railroad ties which were then to be refurbished by Atlas and Judds in Denver, Colorado and then banded, loaded and shipped by railcar to various locations as designated by Burlington Northern. A copy of said agreement is attached hereto and made a part hereof as Exhibit A.

5. Pursuant to the terms of the Agreement, Atlas and Judds Brothers agreed to indemnify and save harmless Burlington Northern from and against any and all losses, claims, demands, suits, causes of action, costs and attorneys' fees, including, but not limited to, injuries or death to employees of Burlington Northern (including claims filed by BN employees under the Federal Employer's Liability Act) caused solely by the negligence of Atlas and Judds Brothers.

6. On October 13, 1988, at or near Centralia, Illinois, Buddy Stanley, a Burlington Northern employee, while unloading certain railroad ties that had been refurbished and banded by Atlas and Judds, was injured when the bands of refurbished railroad ties broke.

7. That the injuries to Mr. Stanley were proximately caused by the negligence of Judds Brothers and Atlas in one or more of the following respects:

(a) the said ties were not tightly bundled together;

(b) the banding on said bundles was not done according to specification; and

(c) the banding material was not of sufficient strength to prevent the bundles of ties from breaking.

8. On October 2, 1991, Mr. Stanley commenced suit against Burlington Northern in the Circuit Court, Third Judicial Circuit, Madison County, Illinois, under the FELA claiming damages for his injuries.

9. On March 13, 1993, Burlington notified Atlas and Judds Brothers by mail of the claim and suit of Mr. Stanley, that the case has a settlement value of $250,000, whether they would pay this amount to settle the suit and to let Burlington Northern know by April 15, 1993 or Burlington Northern would attempt to settle the claim and seek indemnity from them for the settlement amount.

10. Atlas and Judds Brothers responded on March 18, 1993 denying any duty to indemnify Burlington Northern.

11. On April 20, 1993, Burlington Northern caused a Third Party Complaint to be served on Atlas and Judds Brothers claiming indemnity and contribution pursuant to the Agreement.

12. On or about April 21, 1993, Burlington Northern settled with Mr. Stanley for the sum of $250,000 of which

$4,706.84 was withheld to satisfy Railroad Retirement Board liens, and $5,918.26 was withheld to satisfy supplemental sickness benefits.

13. On or about May 10, 1993, Atlas and Judds Brothers filed a special appearance to contest the jurisdiction over them in Illinois. This motion has not been ruled upon to date, and Burlington Northern's Third Party Complaint remains active.

14. Despite demand, Atlas and Judds Brothers has failed and refused to reimburse Burlington Northern for the payments made in settlement of Mr. Stanley's lawsuit as well as medical treatment and wage payments.

15. As a result of Atlas and Judds Brothers' breach of its indemnification agreement in this matter, Burlington Northern has been damaged in the amount of $239,374.20.

WHEREFORE, Burlington Northern prays for judgment against Atlas and Judd's Brothers in an amount to be determined at trial, and for costs, interest, attorneys fees, and such other and further relief as the Court deems just and proper.

Dated this 4th day of January, 1995.

KNUDSEN, BERKHEIMER, RICHARDSON & ENDACOTT

By: /s/ Walter J. Downing
Walter J. Downing #11257
1401 17th Street Suite 510
Denver, CO 80202
(303) 295-4250
Attorney for Plaintiff

Plaintiff's Address:

1401 17th St. #1560
Denver, CO 80202

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JUDGE KOPF

Civil Action No. 95-N-186

BURLINGTON NORTHERN RAILROAD COMPANY,

Plaintiff(s),

vs.

ATLAS COMPANY OF LINCOLN, a Nebraska corporation and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska corporation,

Defendant(s).

ORDER

(Filed Mar. 21, 1995)

ORDER ENTERED BY MAGISTRATE JUDGE O. EDWARD SCHLATTER

Shawn Schroeder, Secretary

Defendants have filed a motion for change ot venue, [February 24, 1995], asking that the case be transferred to the United States District Court for the District of Nebraska. Plaintiff filed a response stating that it has no objection to the motion.

IT IS THEREFORE ORDERED that venue in this case is transferred from this Court to the U.S. District Court for the District of Nebraska.

DATED at Denver, Colorado on: March 21, 1995

BY THE COURT:

/s/ O. Edward Schlatter
O. Edward Schlatter
United States Magistrate Judge

I certify that I have duly mailed a copy of the foregoing Order to the following:

Walter J. Downing, Esq.
KNUDSEN, BERKHEIMER, RICHARDSON & ENDACOTT
1401 17th Street, Suite 510
Denver, CO 80202

Robert B. Douglas, Esq.
4949 South Syracuse Street
Suite 400
Denver, CO 80237

Dated: March 21, 1995

/s/ Shawn Schroeder
Secretary to Magistrate Judge Schlatter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, v. ATLAS COMPANY OF LINCOLN, a Nebraska corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska corporation, Defendants.	Case No. 4:CV95-3113 **DEFENDANT'S ANSWER AND AMENDED COUNTERCLAIM** (Filed May 10, 1995)

COMES NOW the Defendants Atlas Company of Lincoln and Judds Brothers Construction Company, by and through their attorneys, and do herein file their Answer and Amended Counterclaim as follows:

1. Admits the allegations set forth in paragraphs 1, 2, 8, 10, 11, and 13 of Plaintiff's Complaint;

2. Denies the allegations set forth in paragraphs 3, 7, and 15 of Plaintiff's Complaint;

3. With regard to the allegations set forth in paragraphs 4 and 5, Defendants admit that in 1987 they entered into a contract with the Plaintiff to refurbish railroad ties and that the contract contained an indemnification provision for injuries occurring on the Colorado

work-site, which were caused solely by Defendants' negligence. The remaining allegations of these paragraphs are denied;

4. With regard to the allegations set forth in paragraph 9, Defendants admit that on March 13, 1993, Burlington notified Atlas and Judds Brothers by mail of the claim and suit of Mr. Stanley, but deny the remaining allegations of this paragraph;

5. Is without knowledge of the truth or falsity of the allegations set forth in paragraphs 6, 12 and 14 of Plaintiff's Complaint, and they are therefore, denied;

6. Denies each and every allegation of Plaintiff's Complaint not specifically answered herein.

ADDITIONAL DEFENSES

7. Plaintiff's losses were caused, in whole or in part, as a result of Plaintiff's negligence or the negligence of Plaintiff's employees;

8. Plaintiff's losses were caused, in whole or in part, as a result of the actions or negligence of third parties over whom Plaintiff had no control;

9. Plaintiff's action is barred by the application of the controlling statute of limitations and the doctrine of laches;

10. Plaintiff failed to mitigate its damages;

11. Plaintiff acted as a volunteer and was negligent in settling the underlying claim for the amount claimed.

WHEREFORE, the Defendants pray that this Court enter an Order dismissing the Plaintiff's Petition and claims with prejudice, at Plaintiff's costs, and further prays for all other relief which is just and equitable in this matter.

AMENDED COUNTERCLAIM

COMES NOW the Defendants, by and through their attorneys, and for their counterclaim against the Plaintiff, do herein state and allege as follows:

1. Defendants are Nebraska corporations with their principal place of business in Nebraska;

2. Plaintiff is a Delaware corporation;

3. The amount in controversy is in excess of $50,000;

4. Prior to January 16, 1990, the Defendant Judds Brothers Construction Company was engaged in litigation with the Burlington Northern Railroad, as a result of certain construction which took place at an intermodel facility located in Omaha, Nebraska, then known as the "Gibson Yard" project. Such litigation was pending before the District Court of Douglas County, Nebraska;

5. On or about January 16, 1990, Judds Brothers Construction Company and the Burlington Northern Railroad entered into an understanding and agreement to settle the litigation and claims arising out of the construction work performed at the Gibson Yard intermodel facility located in Omaha, Nebraska. Pursuant to that settlement agreement, the terms of which were to be "confidential," the Burlington Northern Railroad orally and in writing agreed that thereafter that Judds Brothers

Construction Company would continue to be a supplier of construction services to the Burlington Northern Railroad Company. Such oral and written representations were made on and before January 22, 1990. These oral and written contracts and representations carried with them an implied covenant of good faith and fair dealing and provided for the continuing opportunity of the Defendant Judds Brothers Construction Company to bid on and reasonably obtain work on Plaintiff's construction projects;

6. Following the oral and written agreements of the parties, the Plaintiff solicited the Defendant Judds Brothers Construction Company on certain projects and actually awarded Judds Brothers Construction Company contracts on some of the same. However, after the Plaintiff filed its "Third-Party Complaint" seeking contribution against Judds Brothers Construction Company, in the Circuit Court of the Third Judicial District of Madison County, Illinois, the Plaintiff, on information and belief, intended thereafter not to accept any such bids from Judds Brothers Construction Company, and further, on information and belief, discontinued to consider this Defendant as a possible or actual supplier of construction services to the Plaintiff;

7. During the fall/winter construction season of 1993, the Defendant Judds Brothers Construction Company submitted a bid to the Burlington Northern Railroad with regard to the construction of a bridge located near Grand Island, Nebraska. The approximate amount of such bid was $13.9 million, and Judds Brothers Construction Company believes it was the low bidder on this

project. Judds Brothers Construction Company had previously been requested by the Burlington Northern Railroad Company to submit a bid on this project and in compliance with such request submitted, what Judds Brothers Construction Company presently believes to be the low bid. The Plaintiff refused to grant such contract to the Defendant Judds Brothers Construction Company, and gave no explanation or reason to the Defendant Judds Brothers Construction Company why such bid was not accepted;

8. During approximately the month of May of 1994, the Defendant Judds Brothers Construction Company again submitted a bid to the Plaintiff Burlington Northern Railroad with regard to certain construction at the Hobson yard. Judds Brothers Construction Company was orally informed that after an existing labor contract was settled, the Burlington Northern Railroad would award the contract to Judds Brothers Construction Company. However, the Burlington Northern, through a believed authorized representative, informed Judds Brothers Construction Company thereafter that the Burlington Northern Railroad had changed its mind, and that the contract would not be awarded to Judds Brothers Construction Company. No explanation or rationale for the failure to accept Judds Brothers Construction Company's bid was given;

9. Plaintiff has intentionally precluded Defendants' rights to bid on its construction projects in violation of Plaintiff's express oral and written agreements;

10. As a result of Plaintiff's conduct, Defendants have suffered lost time, and lost profits.

WHEREFORE, Defendants and Counterclaimants seek judgment for their lost time, lost profits, prejudgment interest and attorneys fees as provided by law and for all just and proper relief.

JURY DEMAND

Defendants and Counterclaimants, Judds Brothers Construction Company and Atlas Company of Lincoln seek a trial by jury on all issues so triable in this action.

REQUEST FOR TRIAL IN LINCOLN, NEBRASKA

COMES NOW the Defendants, by and through their attorneys, and do herein request that the trial of this matter be held in Lincoln, Nebraska.

JUDDS BROTHERS
CONSTRUCTION COMPANY
and ATLAS COMPANY OF
LINCOLN, Defendants

By: /s/ William G. Dittrick
of BAIRD, HOLM,
McEACHEN,
PEDERSEN,
HAMANN &
STRASHEIM
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 344-0500

By: /s/ Dean F. Suing
of KATSKEE,
HENATSCH & SUING
10404 Essex Court, #100
Omaha, Nebraska 68114
(402) 391-1697

Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Answer and Amended Counterclaim was sent by United States mail, postage prepaid this 10 day of May, 1995, to the following:

Rodney Confer
1000 NBC Center
Lincoln, Nebraska 68508

/s/ William G. Dittrick
William G. Dittrick

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, -vs- ATLAS COMPANY OF LINCOLN, a Nebraska Corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska Corporation, Defendants.	CASE NO. 4:CV95-3113 STIPULATION FOR DISMISSAL, OF PLAINTIFF'S COMPLAINT ONLY WITH PREJUDICE (Filed Nov. 27, 1995)

NOW COME the parties hereto, by and through their attorneys, and hereby Stipulate and agree that plaintiff's Complaint only has been compromised and settled between them and should, therefore, be dismissed, with prejudice; that, the parties further agree that the defendants' Amended Counterclaim has not been settled and compromised, and therefore, same should not be dismissed.

It is further stipulated and agreed between the parties that any signatory party hereto may present the signed original of this Stipulation to the Court to obtain the entry of an Order of Dismissal in conforming herewith.

DATED this 27th day of November, 1995.

BURLINGTON NORTHERN
RAILROAD
COMPANY, Plaintiff,

By /s/ Rodney M. Confer,
Rodney M. Confer
#10753
of KNUDSEN,
BERKHEIMER,
RICHARDSON &
ENDACOTT
1000 NBC Center
Lincoln, Nebraska 68508
(402) 475-7011

Its Attorneys.

ATLAS COMPANY OF
LINCOLN and JUDDS
BROTHERS CONSTRUCTION
COMPANY, Defendants,

By /s/ Dean F. Suing,
Dean F. Suing #15174
Of KATSKEE,
HENATSCH & SUING
10404 Essex Court
Suite #100
Omaha, Nebraska 68114
(402) 391-1697

and

By /s/ William G. Dittrick
William G. Dittrick,
#11024
Of BAIRD, HOLM,
McEACHEN,
PEDERSEN, HAMANN
& STRASHEIM
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 636-8205

Its Attorneys.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, -vs- ATLAS COMPANY OF LINCOLN, a Nebraska Corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska Corporation, Defendants.	CASE NO. 4:CV95-3113 ORDER OF DISMISSAL (Filed Nov. 29, 1996)

NOW on this 29th day of November, 1995, this matter comes on to be heard by the Court on the Stipulation for Dismissal* of plaintiff's Complaint only, executed by the parties by virtue of which the Court is advised that the plaintiff's cause of action has been settled and compromised between them and requesting that the Court enter an Order herein dismissing the Complaint only, with prejudice; that the Court further finds that the Amended Counterclaim has not been settled and that further proceedings should be had with regard to the Amended Counterclaim in accordance with the Order Setting Schedule for Progression of Case entered by the Court on June 6, 1995.

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's Complaint only be, and the same hereby is,

dismissed, with prejudice, and that further proceedings be had with regard to the Amended Counterclaim of defendants in accordance with the Order Setting Schedule for Progression of Case.

11/29/95
BY THE COURT:
/s/ Richard G. Kopf
U.S. DISTRICT JUDGE
Richard G. Kopf

Prepared and Submitted by:

Dean F. Suing, #15174
of KATSKEE, HENATSCH & SUING
10404 Essex Court
Suite #100
Omaha, Nebraska 68114
(402) 391-1697

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, vs. ATLAS COMPANY OF LINCOLN, a Nebraska Corporation, and JUDDS -BROTHERS CONSTRUCTION COMPANY, a Nebraska Corporation, Defendants.	Case No. 4:CV95-3113 **REPLY TO COUNTERCLAIM**

Burlington Northern Railroad Company replies to Defendant's Amended Counterclaim herein as follows:

1. Admits the allegations of paragraphs 1-4 of the Amended Counterclaim.

2. Admits the allegations that the parties entered into an agreement to settle the litigation and claims arising out of the construction work performed at Gibson Yard on January 16, 1990, and that the terms of the settlement agreement were to be confidential, as alleged in paragraph 5 of the Amended Counterclaim; Burlington Northern specifically denies that it made oral agreements as alleged in paragraph 5, and further alleges that any written agreements speak for themselves, but do not include the terms alleged by defendant; the remaining allegations of paragraph 5 of the Amended Counterclaim are denied.

3. The allegations of paragraph 6, to the effect that there were oral agreements of the parties, are denied; Burlington Northern admits, however, that it has solicited defendant to submit offers and has entered into contracts with Judds Bros. Construction Company since 1990; Burlington Northern further alleges, on information and belief, that other corporations which are subsidiaries of, associated with, under common ownership with, or under control of defendants have also been solicited for offers and have entered into contracts with Burlington Northern Railroad Company since 1990. Each and every other allegation of paragraph 6 of the Amended Counterclaim not specifically admitted herein is denied.

4. Burlington Northern admits the allegation in paragraph 7 of the Amended Counterclaim that Judds Bros. Construction Company submitted an offer in the fall or winter of 1993 to construct a bridge located near Grand Island, Nebraska, but alleges that the offer submitted by Judds Bros. Construction Company and all other offers on the project greatly exceeded the estimated budget for the project and were rejected; Burlington Northern revised the project to come within its budget and again invited defendant to submit an offer to construct the revised project; defendant made an offer to construct the revised project which greatly exceeded the low bid and Burlington Northern rejected defendant's offer; Burlington Northern denies each and every other allegation in paragraph 7 not specifically admitted herein.

5. In reply to paragraph 8 of the Amended Counterclaim, Burlington Northern alleges that in June of 1994, Defendant and another construction company made offers to construct a freight pit fueling project; although

Defendant's offer was slightly less than the other contractor's, after receiving the offers Burlington Northern engineering representatives met with both contractors and determined that the other contractor's offer was preferable from the standpoint of meeting specifications, meeting contract standards and meeting the time schedule, and would involve the least amount of difficulty for Burlington Northern Railroad Company and less risk of extra orders; accordingly Burlington Northern accepted the other contractor's offer to perform the work and rejected defendant's offer; each and every other allegation of paragraph 8 of the Amended Counterclaim not specifically admitted herein is denied.

6. The allegations of paragraphs 9 and 10 of the Amended Counterclaim are denied.

7. Burlington Northern denies each and every other allegation of the Amended Counterclaim not specifically admitted herein.

FIRST DEFENSE

8. Defendant's Amended Counterclaim fails to state any cause of action upon which relief may be granted.

SECOND DEFENSE

9. Any oral agreement alleged by Defendant was not to be performed within one year from the making thereof, and therefore violated the statute of frauds, *Neb. Rev. Stat.* §36-202.

THIRD DEFENSE

10. Burlington Northern denies any oral or written contract providing that Judds Bros. Construction Company would continue to be a supplier of construction services to Burlington Northern Railroad Company for a definite or indefinite period of time in the future.

FOURTH DEFENSE

11. Burlington Northern denies any oral or written contract imposing a duty on its part to accept defendant's offers to construct projects upon which it submitted bids.

FIFTH DEFENSE

12. Any cause of action alleged by defendants herein is barred by the applicable statute of limitations.

WHEREFORE, plaintiff Burlington Northern Railroad Company prays for judgment herein, that defendant's Amended Counterclaim be dismissed, at defendants' costs, and for such further relief as the Court deems appropriate in the premises.

BURLINGTON NORTHERN
RAILROAD COMPANY,
Defendant

By: KNUDSEN, BERKHEIMER,
RICHARDSON & ENDACOTT
1000 NBC Center
Lincoln, Nebraska 68508
(402) 475-7011

By: /s/ Rodney M. Confer
Rodney M. Confer – #10753
One of Said Attorneys

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and correct copy of the foregoing Reply to Counterclaim to be served on William A. Dittrick, 1500 Woodmen Tower, Omaha, NE 68102, by First Class United States mail, sufficient postage prepaid on this 23rd day of April, 1996.

/s/ Rodney M. Confer
Rodney M. Confer

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, v. ATLAS COMPANY OF LINCOLN, a Nebraska Corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska Corporation, Defendants.	Case No. 4:CV95-3113 **REPLY TO PLAINTIFF'S "REPLY TO COUNTERCLAIM" (ANSWER)** (Filed May 3, 1996)

COMES NOW Judds Brothers Construction Company, Inc. (Judds), by and through their attorneys, and for its "Reply" to the "Reply to Counterclaim" filed by the Plaintiff, herein does herein state and allege as follows:

1. Judds does herein deny each and every allegation of new matter contained within the Plaintiff's "Reply to Counterclaim" except those allegations hereinafter admitted and those allegations constituting admissions against the interest of the Burlington Northern Railroad Company.

WHEREFORE, Judds reinstates herein as if plead [sic] herein, the prayer of its Counterclaim, and further prays for all other relief which is just and proper.

JUDDS BROTHERS CONSTRUCTION COMPANY, INC. and ATLAS COMPANY OF LINCOLN, Defendants

By: /s/ William G. Dittrick
William G. Dittrick

of BAIRD, HOLM, McEACHEN, PEDERSEN, HAMANN & STRASHEIM
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 344-0500

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Reply to Plaintiff's "Reply to Counterclaim" was sent by United States mail, postage prepaid this 3 day of May, 1996, to the following:

Rodney Confer
1000 NBC Center
Lincoln, Nebraska 68508

/s/ William G. Dittrick
William G. Dittrick

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, **Plaintiff,** **v.** **ATLAS COMPANY OF LINCOLN, a Nebraska Corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska Corporation,** **Defendants.**	**Case No. 4:CV95-3113** **ORDER OF FINAL PRE-TRIAL CONFERENCE** (Filed 12/11/97)

A final pretrial conference was held on the 28th day of June, 1995. Appearing for the parties as counsel were:

For the Defendant: William G. Dittrick (#11024)
Kelly R. Dahl (#19273)
For: BAIRD, HOLM,
McEACHEN, PEDERSEN,
HAMANN & STRASHEIM
1500 Woodmen Tower
Omaha, NE 68102-2068
Telephone: (402) 636-8223

For the Plaintiff: Rodney M. Confer (#10753)
For: KNUDSEN,
BERKHERIMER,
RICHARDSON,
ENDACOTT & ROUTH
1000 NBC Center
Lincoln, NE 68508-1474
402-475-7011

A. *EXHIBITS IN EVIDENCE.* The only objections made to the exhibits are those shown on the attached list.

B. *FOUNDATION FOR EXHIBITS.* The only objections made to the exhibits are those shown on the attached list. *See* Plaintiff's and Defendant's List of Exhibits attached hereto.

C. *EXHIBITS CONTESTED ON ALL GROUNDS.* The admission of the following exhibits is contested on all grounds: *See* Plaintiff's List of Exhibits and Defendant's List of Exhibits attached hereto.

Caution: The mere listing of an exhibit on an exhibit list by a party does not mean it can be offered into evidence by the adverse party without all necessary evidentiary prerequisites being met. ** The exhibits listed may be amended (by addition) by notice to opposing counsel at least fifteen days prior to trial.

D. *UNCONTROVERTED FACTS AND ISSUES.* The parties have agreed that the following may be accepted as established facts for purposes of this case only:

The Parties agree and stipulate that the Plaintiff Burlington northern Railroad Company n/k/a Burlington Northern and Santa Fe Railway Company ("BNRR") is a corporation practicing business in the State of Nebraska. The Defendant Judds Brothers Construction Company ("Judds") is a corporation whose principal place of business is in the State of Nebraska.

The Plaintiff and Defendant have agreed with regard to the below listed exhibits that the same shall be admitted as such at the trial of this action.

E. *CONTROVERTED AND UNRESOLVED ISSUES.* The issues remaining to be determined and unresolved matters for the court's attention are:

Plaintiff BNRR's Statement of Controverted and Unresolved Issues

1. Whether the Settlement Agreement of January 16, 1990 or the letter of 1-22-90 or any oral promise gives Judds a contractual right to bid on Burlington Northern Railroad construction projects.

2. Whether the Settlement Agreement of January 1, 1990 or the letter of 1-22-90 or any oral promise gives Judds Bros. a contractual right to contract with BNRR.

3. Whether BNRR has breached its Settlement Agreement of January 16, 1990.

Defendant Judds; Statement of Additional Controverted and Unresolved Issues

1. Whether, as part of the settlement of an existing lawsuit between the parties, an oral and/or written contract or promise was made by the BNRR to Judds on or about January 16, 1990 wherein the BNRR agreed that it would continue thereafter to notify and allow Judds to bid on (and be awarded such bids if their bids were low) BNRR construction projects involving grading, utilities, concrete work, and bridge construction.

2a. Whether, during the fall of 1993, the BNRR breached this contract by failing to accept Judds Brothers' low bid with regard to a

construction project known as the "Grand Island, Nebraska Grade Separation" (AFE 93-0656) and further in failing to negotiate with Judds for a lower bid.

Whether further, in the fall of 1993, the BNRR breached its contract with Judds by giving a competitor (Lawrence Construction Co.) information regarding Judds prior bid, which allowed Lawrence to submit a lower bid than Judds Brothers during the second round of bidding.

2b. What damages Judds Brothers suffered as a result of this breach by BNRR of their contract and promises made.

3a. Whether during the spring of 1994, the BNRR again breached its contract with Judds Brothers by requesting Judds Brothers to bid on a project known as the Lincoln, Nebraska Fueling Upgrade (AFE 94-1174), and after Judds Brothers had submitted the low bid, had been orally told they had the contract and had been recommended for the bid by the engineers, the BNRR thereafter refused to contract with Judds Brothers' for the project, and instead awarded the bid to a competitor of Judds Brothers.

3b. What damages Judds Brothers has suffered as a result of the BNRR's above-mentioned breach of contract.

4a. Whether the BNRR, after June of 1994, generally breached its contract and promises with Judds by refusing to notify Judds of all the construction projects available for bidding.

4b. What damages Judds has suffered as a result of such breach.

F. *WITNESS:* All witnesses, including rebuttal witnesses, whom PLAINTIFF expects to call to testify, except those who may be called for impeachment purposes only, are the witnesses listed by Defendant and:

WITNESSES

Larry Woodley
Ron Schapp
Richard Lawrence
Parker Adelman
R.J. Stremcha
Robert Boileau

Plaintiff will probably use the following depositions:

John Judds
Ray Judds
Kevin Steele

All witnesses, including rebuttal witnesses, whom DEFENDANT JUDDS expects to call to testify, except those who may be called for impeachment purposes only, are the witnesses listed by the Plaintiff and:

WITNESSES

Raymond Judds
John R. Judds
Kevin Steele
William Walters
Patrick Barclay
Trent Hudak
David Purdy
G. G. Albin
Jack Moy
William Glavin
James Eggen
Duane Curbow

Jerry Helms
Bud Shipman
Dana Johnson
Lawrence Krug (Hooker Bros.)
Charles Leichner (HDR)
William Raleigh (HDR)
John Bosshart
** Defendant Judds will probably use the following depositions:

William Glavin
Patrick Barclay
G.G. Albin
Jack Moy
Trent Hudak

It is understood by both parties that they may supplement this list and the expert witness list at any time within the next 45 days, and except upon a showing of good cause, no other witness whose name and address does not appear herein or on a supplemental list hereto (filed within 45 days hereof) shall be permitted to testify over objection for any purpose except impeachment. A witness appearing on any party's witness list may be called by the other party.

G. *EXPERT WITNESSES' QUALIFICATIONS.* Experts to be called and their qualifications are:

FOR THE PLAINTIFF:

Patrick Barclay
Trent Hudak
David Purdy
G.G. Albin
Jack Moy
Jerry Helms

FOR THE DEFENDANT:

John Judds: See biographical attached.

Kevin Steele: See biographical attached.

H. *DEPOSITIONS AND OTHER DISCOVERY DOCUMENTS.*

1. All depositions, answers to written interrogatories, and requests for admissions or portions thereof which the Plaintiff presently plans to offer in evidence by the **PLAINTIFF** as part of the Plaintiff's case-in-chief are:

Depositions:

Raymond Judds
John Judds
Kevin Steele

Plaintiff shall at the time of trial present a copy of such depositions, which are to be used, and such depositions shall be highlighted in green to show the portions of the same offered by the Plaintiff. Copies of the same shall have been presented to opposing counsel at least 10 calendar days prior to trial.

***Objections* (other than as to form and foundation made at the deposition) by Defendant are:**

Noted in yellow in the margins of the highlighted copies of the deposition transcripts to be used at trial.

Answers to Written Interrogatories: Defendant Judds' Answers to Plaintiff's Interrogatories.

Objections by Defendant are: Those noted in the documents.

Responses to Requests for Admissions:

Objections by Defendant are:

2. All depositions, answers to written interrogatories, and requests for admissions or portions thereof which are expected to be offered in evidence by the **DEFENDANT** Judds as part of the Defendant's case-in-chief are:

Depositions:

1. William Glavin
   Patrick Barclay
   G.G. Albin
   Jack Moy
   Trent Hudak

2. Remaining portions of the depositions identified by the Plaintiff.

Defendant Judds shall at the time of trial present a copy of all depositions, which are to be used, and such depositions shall be highlighted in yellow to show the portions of the same offered by the Defendant. Copies of the same shall have been presented to opposing counsel at least 10 calendar days prior to trial.

Objections (other than as to form and foundation made at the deposition) by Plaintiff are to be noted in green in the margins of the highlighted copies of the deposition transcripts to be used at trial.

STIPULATION: SUBJECT TO COURT APPROVAL, IT IS AGREED THAT THE PARTIES MAY SUPPLEMENT THEIR DEPOSITION DESIGNATIONS BY ADDING FURTHER DESIGNATIONS FROM TAKEN DEPOSITIONS IN THE EVENT OF UNAVAILABILITY AT TIME OF TRIAL

OF ANY WITNESS NOW EXPECTED TO BE CALLED AS A LIVE WITNESS. FURTHER, THE PARTIES, WITHIN THE NEXT 45 DAYS, MAY TAKE THE DEPOSITIONS OF ADDITIONAL WITNESSES).

Objections by Plaintiff are: Objections (other than as to form and foundation made at the deposition) are noted in the margins of highlighted copies of the depositions.

Answers to Written Interrogatories:

1. Plaintiff's Answers to Interrogatories

Objections by Plaintiff are: Those noted in the documents

Responses to Requests for Admissions:

None.

Objections by Plaintiff are:

I. *VOIR DIRE.* Counsel have reviewed Fed. R. Civ. P. 47(a) and NELR 47.1. The parties request that the Court conduct a preliminary examination of prospective jurors, with counsel for both parties asking follow-up questions.

J. *NUMBER OF JURORS.* The parties suggest that this matter be tried to a jury composed of 12 members.

K. *VERDICT.* The parties will not stipulate a less than unanimous verdict.

L. *DELIVERY OF BRIEF AND INSTRUCTIONS.*

1. Trial briefs shall be delivered to the trial court judge at least three (3) working days before the first day of trial.

2. Proposed jury instructions shall be delivered to the trial court judge on or before the first day of trial.

M. *LENGTH OF TRIAL.* Counsel estimate the length of trial will consume not less than four (4) days, not more than six (6) days, and probably about five (5) or six (6) days. The parties request a date certain for the trial to begin.

N. *TRIAL DATE.* Trial is set at the court's call in Feb. 1998 as soon thereafter as the case may be called.

DATED this 11 day of December, 1997.

By: /s/ William G. Dittrick
William G. Dittrick (#11024)

Of BAIRD, HOLM, McEACHEN, PEDERSEN, HAMANN & STRASHEIM
1500 Woodmen Tower
Omaha, NE 68012-2068
Telephone: (402) 636-8223

Attorneys for Defendant

BY THE COURT:

/s/ David L. Piester
David L. Piester
United States Magistrate Judge

BY: /s/ Rodney M. Confer
Rodney M. Confer

Of: KNUDSEN, BERKHEIMER, RICHARDSON, ENDACOTT & ROUTH
1000 NBC Center
Lincoln, NE 68508-1404
(402) 475-7011

Attorneys for Plaintiff

BEST AVAILABLE COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY,

Plaintiff,

vs.

ATLAS COMPANY OF LINCOLN, a Nebraska corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska corporation,

Defendant.

4 :CV95-3113

LIST OF EXHIBITS

Deputy _____

Reporter _____

Trial Dates: _____

Exhibit Number		Description	Witness	Off'd	Objec.*	Rec'd	Not Rec'd	Date
Plaintiff	Defendant Judds							
	1	5/26/96 B.N. Contract (B2 West Refueling Facility)				X		
	2							
	3	Financial Statements of Judds = year ended 1997			FC	[redacted]		
	4	Financial Statements of Judds = year ended 1994			"			
	5	Financial Statements of Judds = year ended 1995			"			
	6	Financial Statements of Judds = year ended 1996			"			
	7				"			
	8	Nebr. newspaper article (11/11/93) (0737)			H			
	9	Nebr. newspaper article			H			
	10	First Judds' Bid on Gr. Island job				X		

Exhibit Number		Description	Witness	Off'd	Objec.*	Rec'd	Not Rec'd	Date
Plaintiff	Defendant Judds							
	11.	Second Judds' Bid on Gr. Island job				X		
	12.	9/26/94 Field memo (Bill Lawrence)			RHC			
	13.	11/8/94 HDR fax			"			
	14.	3/20/95 HDR letter to Barclay			"			
	15.	Judds' 2nd Bid working file (Gr. Is.)			"			
	16.	Judds' 1st Bid working file (Gr. Is.)			"			
	17.	Overhead Cost Exhibits			ALL			
	18.	5/3/91 HDR letter (01-5)			"			
	19.	BN-HDR contract (013-22)			RHC			
	20.	DeLeuw Estimates (051-52)			ALL			
	21.	ROW memos & additional costs (0474-0483)			"			
	22.	Press Release of BN (062-063)			"			
	23.	7/1/94 Schapp Memo to Gerald Albin (0501-0511) (extra ROW work)			RC			
	24.	8/24/94 Rick Lawrence letters to Pat Barclay = compensation for added ROW work (0512-0523)			ALL			
	25.	8/9/94 BN letter to Leichner (00528)			"			
	26.	AFE - track work analysis (064-77)			RHC			
	27.	HDR letter to Barclay (7/28/94) (reason for extra cost)			"			
	28.	10/10/94 Lawrence letter to Barclay (0548) (Lawrence asked for redesign)			"			

* Key to Objection Abbreviations

Materiality.....M
Relevancy.....R
Hearsay.....H
Foundation.....F
Other.....O

Exhibit Number		Description	Witness	Off'd	Objec.*	Rec'd	Not Rec'd	Date
Plaintiff	Defendant Judds							
	29.	10/24/94 Barclay to Lawrence and attachment (0549-0551)			ALL			
	30.	Barclay letter to Raleigh of HDR (4/22/95) (0552-0554) (settle for $50,000)			RHC			
	31.	3/20/95 Raleigh letter to Barclay with summary of added cost problems (0569-0575)			"			
	32.	5/25/94 Lawrence letter to BN (demolish houses and trees) (0588-0589)			ALL			
	33.	Feasibility Study (0264-0304)			"			
	34.	AFE of Gr. Is. Project (0305-0327) (allocation of budget items)			RC			
	35.	Feasibility figure (0332-0336)			ALL			
	36.	HDR Design Changes (0649-0701)			ALL			
	37.	Memo of BN to Gustofson (0421) -- total cost is 22.9 million			RFC			
	38.	Costs estimates (0422-0424)			ALL			
	39.	0425 = Extra Order #16 (12/15/95)			RC			
	40.	0426-430 Extra Order #19 estimate			ALL			
	41.	Post bid addendum 3/31/94 (0702-0712)			ROF			
	42.	Meeting with Lawrence & Ames 6/4/94 (0716)			ALL			
	43.	BNSF meeting 7/14/94 (0718-0721)			"			
	44.	AFE 93-0656 12/31/94 (0724)			"			

* Key to Objection Abbreviations

Materiality.....M
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Exhibit Number		Description	Witness	Off'd	Objec.*	Rec'd	Not Rec'd	Date
Plaintiff	Defendant Judds							
	45.	HDR letter retaining walls 10/4/93 (0725-0726)			ALL			
	46.	HDR memo 11/8/93 to Lawrence not allowing main line out of service (0729)			"			
	47.	Lawrence letter to HDR 11/5/93 constructability of utilities (0730-0731)			"			
	48.	HDR letter to BNSF (0735-0736)			"			
	49.	BNRR (0737)			"			
	50.	Bid Summary 1/9/93 with comments (0769-0777)			"			
	51.	Bid Summary (Jan.) (0787-0802)				X		
	52.	JBCC Cost Savings Proposal 11/15/93 (0819)			RC			
	53	Sept. 1. 1992 letter (0846)			ALL			
	54	Dec. 3. 1993 reject letter (0850)			"			
	55	Lawrence Contract (0855-0873)				X		
	56	Change Order #2 (JN001395)			HRC			
	57	C.O. #1 (JN001400-01)			"			
	58	Neosho Invoice - Inspection/Consulting (JN001403-04)			"			
	59	8/15/94 Mtg. Minutes (JN001417)			All			
	60	Project Schedule (JN001419)			"			
	61	Cost Estimates (JN001425-1433)			"			
	62	Neosho Contract (JN001437-1446)				X		
	63	7/21/94 letter (JN001450)			All			

* Key to Objection Abbreviations

Materiality.....M
Relevancy.....R
Hearsay.....H
Foundation.....F
Other.....O

Exhibit Number		Description	Witness	Off'd	Objec.*	Rec'd	Not Rec'd	Date
Plaintiff	Defendant Judds							
	64.	7/19/94 letter (JN001457)			All			
	65.	Neosho/Judds Price Revisions /Mtg. (JN001467-1503)			"			
	66.	* Interoffice Memo (JN001603)			"			
	67.	Letter (cover letter for Contract - Neosho) (JN001873)			"			
	68.	Letter - Frequency of Extras (JN001880)			"			
	69.	Letter - Midam (JN001900)			"			
	70.	Frt Pit Mtg Report (JN001687-90)			"			
	71.	Frt Pit Bid Evaluation (JN001943)			"			
	72.	→ Havelock Yard-Locker Room/ Lunchroom (JN001957-1959)			"			
	73.	BN Exhibits (Freigh Pit)			"			
	74.	Gibson Yard Complaint				X		
	75.	BN lawsuit and settlement pleadings			all			
	76.	Buddy Stanley petition				X		
	77.	BNRR letter to Judds (May '93)			all			
	78.	Judds response to Stanley			"			
	79.	BNRR Complaint filed in Colo.				X		
	80.	BNRR Answer to Judds' Interrogatories			RO			
	81.	Jan. 16, 1990 letter of Glavin				X		
	82.	Dismissal with Prejudice (1990)				X		
	83.	Dismissal with Prejudice (1990) (HWS)				X		
	84.	Letter of Wicka to Dittrick (Jan. 1990)			all			

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Materiality.....M
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Hearsay.....H
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Other.....O

Exhibit Number		Description	Witness	Off'd	Objec.*	Rec'd	Not Rec'd	Date
Plaintiff	Defendant Judds							
	85.	Letter Agreement 1/22/96				X		
	86.	Settlement Presentation brochure			all			
	87.	NEOSHO's bid on Lincoln Freight Pit				X		
	88.	Final "As Built" drawings on Freight Pit			all			
	89.	Final Pay Request on Freight Pit			all			
	90.	Judds 1st bid on Freight Pit				X		
	91.	6/8/94 Purdy letter to Trent Hudak (and attachment)				X		
	92.	List of 40 projects			all			
	93.	Bid Comparison Sheets (Gr. Is.)				X		
	94.	Feasibility Alternative Map (01996)			REF			
	95.	List of Judds' bid on BN job			FO			
	96.	List of Judds' jobs (all)			FO			
	97.	List of Judd BN jobs and money received			FO			
	98.	Judds' Damage Summary (Gr. Is.)			FO			
	99.	Judds' Damage Summary (Lincoln Fueling)			"			
	100.							
	101.	Judds' Project Summary 1994			all			
	102.	Judds' Project Summary 1995			"			
	103.	Judds' Project Summary 1996			"			
	104.	Utilities; Building; Miscellaneous; Railroad; and Bridges Job Profit Summaries and Backup (1994-1997)			"			

* Key to Objection Abbreviations

Materiality.....M
Relevancy.....R
Hearsay.....H
Foundation.....F
Other.....O

Exhibit Number		Description	Witness	Off'd	Objec.*	Rec'd	Not Rec'd	Date
Plaintiff	Defendant Judds							
	105.	Railroad Job Summaries and Backup (1986-1997)			all			
	106.	B2 West Revenues, Costs, and Summary						
	107.							
	108.							
	109.							
	110.							
	111.							
	112.							
	113.							
	114.							
	115.							

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* Key to Objection Abbreviations

Materiality.....M
Relevancy.....R
Hearsay.....H
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Other.....O

Exhibit Number		Description	Witness	Off'd	Objec.*	Rec'd	Not Rec'd	Date
Plaintiff	Defendant Judds							
201		Moy Ltr. to NEOSHO, 10/10/93				X		
202		February, 1994 Bid Summary				X		
203		2/15/94 Bid of Judds Brothers				X		
204		12/3/93 Ltr. to Contractors				X		
205		Lawrence Construction Ltr. to Helm, 11/12/93				X		
206		Gantry Crane Contract, 7/17/92				X		
207		Wheel Racks and Stops Contract, 9/8/92				X		
208		Truck Shop Concrete Bid, 9/20/94				X		
209		Gurnsey Fueling Facility Bid Summary				X		
210		Judds Brothers Construction Co./Appolo Steel Co. Projects				X		
211		Judds' Ltr. to Bosshart, 10/3/91				X		
212		Judds' Ltr. to Pentas, 9/12/91				X		
213		Judds/ Ltr. to Bosshart, 8/19/91				X		
214		Tie Rehabilitation Contract, 4/7/92				X		
215		Fab Shop Contract Documents			All			
216		Release Agreement, 11/14/95				X		
217		Dismissal of Complaint, BN v. Atlas and Judds				X		
218		B2 Fueling Contract, 5/28/96				X		
219		Grand Island Grade Separation Project Drawings				X		
220		Lincoln Freight Pit Drawings				X		
221		List of Judds Brothers Construction Project Bid to Burlington Northern				X		

* Key to Objection Abbreviations

Materiality.....M
Relevancy.....R
Hearsay.....H
Foundation.....F
Other.....O

Exhibit Number		Description	Witness	Off'd	Objec.*	Rec'd	Not Rec'd	Date
Plaintiff	Defendant Judds							
222		Judds Brothers Construction Company Cash Receipts from Burlington Northern			All			
223		Judds Brothers Construction Company Jobs Completed			All			
224		Manhole Contract				X		
225		Wheel Shop Contract				X		
226		Gantry Crane Contract, 5/17/93				X		
227		Canapy Proposal				X		
228		William Glavin Ltr., 1/22/90				X		

245:46

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* Key to Objection Abbreviations

Materiality.....M
Relevancy.....R
Hearsay.....H
Foundation.....F
Other.....O

John R. Judds
2000 West Branched Oak Road
Raymond, Nebraska 68428

Education: Lincoln Northeast High School

Bachelor of Science Degree,
Construction Management – 1980
University of Nebraska – Lincoln

Work Experience:

1981-1985
Atlas Company of Lincoln, Lincoln, Nebraska
- Estimator/Project Manager

1985-Current
Atlas Utility Company, Tulsa, Oklahoma
Owner/President
- Utility/Concrete Contractor performing work in Oklahoma

1985-Current
Judds Bros. Construction Co.

Vice President 1985-1989
- Handling estimating/project management for utility and concrete construction projects.

President 1989-Current
- Responsible for all aspects of the on going construction business
- Representing 100 million dollars of construction volume
- Estimating/Project Manager of all types of construction projects (General, Utility, Railroad, Concrete)

Major Projects:

- Minuteman II missile dismantlement/Whiteman AFB, Missouri, U.S. Army Corps of Engineers
- Packages 22B, 60, 72, 73, 75, 80 Utility and Concrete Construction/Whiteman AFB, Missouri Representing approximately 10 million in construction value
- NDOR Bridges in Sutherland, NE, Atkinson, NE, Nebraska City, NE, Crab Orchard, NE, Gretna, NE, Elmwood, NE
- Numerous Utility Projects for Tulsa Metropolitan Utility Authority

Affiliations: Nebraska Chapter AGC Board of Directors

Kevin S. Steele
1106 North 66th
Lincoln, Nebraska 68505

Education: Bachelor of Science Degree, Construction Management – 1984
University of Nebraska – Lincoln

Work Experience:

1982-1985
Atlas Company of Lincoln
Estimator/Project Manager

1985-Present
Judds Brothers Construction Company, Lincoln, NE

Estimator/Project Manager 1985/1992

Vice President 1993-Present

Major Projects:

- Rennick Yard Intermodal Facility; Burlington Northern/Denver, Co
- Tie Rehabilitation; Burlington Northern/Denver, Co
- Utility Extension City Campus; University of Nebraska/Lincoln, Ne
- Lincoln Water Plant Expansion; LWS/Lincoln, Ne
- Lincoln Water System 5mg Reservoir/Lincoln, NE
- Lincoln Water System Pump Station/Lincoln, NE
- Hastings Utilities CEM Tower/Hastings, NE
- Ag Processing Site Utilities/Hastings, Ne
- 36" Sanitary Sewer/Grand Island, NE
- NDOR Cass County Bridge/Cass County, NE
- NDOR Lincoln West Bridge Repair/Lincoln, NE

Affiliations: American Railway Engineering Association (AREA)
American Concrete Institute (ACI)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUDDS BROTHERS CONSTRUCTION CO., Plaintiff, vs. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant.	Case Number 4:95CV3113 **COURT MINUTES CIVIL JURY TRIAL** (Filed Mar. 31, 1998) Date: March 30, 1998 Deputy: Cathy J. Scigo Reporter: Rogene S. Schroder Trial Commenced: 10:00 a.m. Trial Concluded: 4:35 p.m.

Trial before Judge Lyle E. Strom, United States District Court, at ~~Omaha~~ Lincoln, Nebraska.

APPEARANCES:

For Plaintiff: William Dittrick; John J. Jolley
For Defendant: Rodney M. Confer; Corey L. Stull

PROCEEDINGS:

[X] Civil trial began.

[X] Jury empaneled (File list of jurors).

[X] Opening statements.

[X] Evidence by [X] Plaintiff [X] Defendant.

[] Plaintiff rests. [] Defendant rests.

[] Closing arguments.

[X] Trial not concluded – continued to March 31, 1998 at 9:00 a.m.

[] Jury returned at without verdict. IT IS ORDERED: to separate and to return and resume deliberations on.

[] Civil trial ended.

IT IS ORDERED:

(X) Oral motion by defendant to sequester witnesses is granted; no written order forthcoming.

CLERK'S USE ONLY:

(X) Terminate Magistrate referral.

() Number of Trial Days with Evidence – Enter Number of Days.

JURY PANEL RECORD

DISTRICT OF NEBRASKA
MARCH 30, 1998
FILED 4:95CV3113

BURLINGTON NORTHERN RAILROAD COMPANY v. ATLAS COMPANY OF LINCOLN, et al.

Rodney M. Confer — William J. Dittrick

Judge Lyle E. Strom

NO.	NAME	CHALLENGED BY P	D	C
1	#16 Wardyn Geraldine			
2	~~#226 Day, Donald L.~~		3	
3	~~#159 Dorcey, Francis J.~~	3		
4	#204 Fredrickson, George			
5	~~#10 Heyen, Joyce M.~~		1	
6	#12 Van-Meter, Shirley L.			
7	~~#88 Booker, Traci L.~~	1		
8	#185 Hoggins, Jefrey M.			
9	#281 Jons, Kent S.			
10	#64 Morrison, Elle M.			
11	#249 McCerter, Lucinda			
12	#175 Hermann, Carolina			
13	#245 Kinney, Kenneth			
14	~~#265 Porter, Sheila M.~~	2		
15	#110 Fonnerman, Robert			
16	#30 Vallabhbhai, Michelle			
17	#109 Benda, Joann L.			
18	~~#26 Boyd, Dennis A.~~		2	

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUDDS BROTHERS CONSTRUCTION CO., Plaintiff, vs. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant.	Case Number 4:95CV3113 **COURT MINUTES CIVIL JURY TRIAL** (Filed Mar. 31, 1998) Date: March 31, 1998 Deputy: Cathy J. Scigo Reporter: Rogene S. Schroder Trial Commenced: 9:00 a.m. Trial Concluded: 4:35 p.m.

Trial before Judge Lyle E. Strom, United States District Court, at ~~Omaha~~ Lincoln, Nebraska.

APPEARANCES:

For Plaintiff: William Dittrick; John J. Jolley
For Defendant: Rodney M. Confer; Corey L. Stull

PROCEEDINGS:

[X] Civil trial resumed.

[] Jury empaneled (File list of jurors).

[] Opening statements.

[X] Evidence by [X] Plaintiff [X] Defendant.

[] Plaintiff rests. [] Defendant rests.

[] Closing arguments.

[X] Trial not concluded – continued to April 1, 1998 at 9:00 a.m.

[] Jury returned at without verdict. IT IS ORDERED: to separate and to return and resume deliberations on ___.

[] Civil trial ended.

IT IS ORDERED:

CLERK'S USE ONLY:

() Terminate Magistrate referral.

() Number of Trial Days with Evidence – Enter Number of Days.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUDDS BROTHERS CONSTRUCTION CO., Plaintiff, vs. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant.	Case Number 4:95CV3113
	COURT MINUTES CIVIL JURY TRIAL
	(Filed Apr. 1, 1998)
	Date: April 1, 1998 Deputy: Cathy J. Scigo Reporter: Rogene S. Schroder Trial Commenced: 9:00 a.m. Trial Concluded: 4:40 p.m.

Trial before Judge Lyle E. Strom, United States District Court, at Lincoln, Nebraska.

APPEARANCES:

For Plaintiff: William Dittrick; John J. Jolley
For Defendant: Rodney M. Confer; Corey L. Stull

PROCEEDINGS:

[X] Civil trial resumed.

[] Jury empaneled (File list of jurors).

[] Opening statements.

[X] Evidence by [X] Plaintiff [] Defendant.

[] Plaintiff rests. [] Defendant rests.

[] Closing arguments.

[X] Trial not concluded – continued to April 2, 1998 at 9:00 a.m.

[] Jury returned at without verdict. IT IS ORDERED: to separate and to return and resume deliberations on ___.

[] Civil trial ended.

IT IS ORDERED:

CLERK'S USE ONLY:

() Terminate Magistrate referral.

() Number of Trial Days with Evidence – Enter Number of Days.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUDDS BROTHERS CONSTRUCTION CO., Plaintiff, vs. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant.	Case Number 4:95CV3113 **COURT MINUTES CIVIL JURY TRIAL** (Filed Apr. 2, 1998) Date: April 2, 1998 Deputy: Cathy J. Scigo Reporter: Rogene S. Schroder Trial Commenced: 9:00 a.m. Trial Concluded: 4:30 p.m.

Trial before Judge Lyle E. Strom, United States District Court, at Lincoln, Nebraska.

APPEARANCES:

For Plaintiff: William Dittrick; John J. Jolley
For Defendant: Rodney M. Confer; Corey L. Stull

PROCEEDINGS:

[X] Civil trial resumed.

[] Jury empaneled (File list of jurors).

[] Opening statements.

[X] Evidence by [] Plaintiff [X] Defendant.

[X] Plaintiff rests. [] Defendant rests.

[] Closing arguments.

[X] Trial not concluded – continued to April 3, 1998 at 9:00 a.m.

[] Jury returned at without verdict. IT IS ORDERED: to separate and to return and resume deliberations on.

[] Civil trial ended.

IT IS ORDERED:

[X] Oral motion by defendant for a directed verdict or in the alternative, judgment as a matter of law is overruled; no written order forthcoming.

CLERK'S USE ONLY:

() Terminate Magistrate referral.

() Number of Trial Days with Evidence – Enter Number of Days.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUDDS BROTHERS CONSTRUCTION CO., Plaintiff, vs. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant.	Case Number 4:95CV3113 **COURT MINUTES CIVIL JURY TRIAL** (Filed Apr. 6, 1998) Date: April 3, 1998 Deputy: Cathy J. Scigo Reporter: Rogene S. Schroder Trial Commenced: 9:00 a.m. Trial Concluded: 5:40 p.m.

Trial before Judge Lyle E. Strom, United States District Court, at Lincoln, Nebraska.

APPEARANCES:

For Plaintiff: William Dittrick; John J. Jolley
For Defendant: Rodney M. Confer; Corey L. Stull

PROCEEDINGS:

[X] Civil trial resumed.

[] Jury empaneled (File list of jurors).

[] Opening statements.

[X] Evidence by [] Plaintiff [X] Defendant.

[] Plaintiff rests. [X] Defendant rests.

[] Closing arguments.

[X] Trial not concluded – continued to April 6, 1998 at 11:00 a.m.

[] Jury returned at without verdict. IT IS ORDERED: to separate and to return and resume deliberations on.

[] Civil trial ended.

IT IS ORDERED:

[X] Oral motion by defendant for a directed verdict or in the alternative, judgment as a matter of law is overruled; no written order forthcoming.

CLERK'S USE ONLY:

() Terminate Magistrate referral.

() Number of Trial Days with Evidence – Enter Number of Days.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUDDS BROTHERS CONSTRUCTION CO., Plaintiff, vs. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant.	Case Number 4:95CV3113 **COURT MINUTES CIVIL JURY TRIAL** (Filed Apr. 7, 1998) Date: April 6, 1998 Deputy: Cathy J. Scigo Reporter: Rogene S. Schroder Trial Commenced: 10:55 a.m. Trial Concluded: 5:15 p.m.

Trial before Judge Lyle E. Strom, United States District Court, at Lincoln, Nebraska.

APPEARANCES:

For Plaintiff: William Dittrick; John J. Jolley
For Defendant: Rodney M. Confer; Corey L. Stull

PROCEEDINGS:

[X] Civil trial resumed.

[] Jury empaneled (File list of jurors).

[] Opening statements.

[X] Evidence by [] Plaintiff [X] Defendant.

[] Plaintiff rests. [X] Defendant rests.

[X] Closing arguments.

[X] Instruction conference.

[] Trial not concluded – continued to ___.

[X] Jury received case at 4:35 p.m.

[] Jury resumed deliberations on ___.

[X] Jury returned at 5:15 p.m. without verdict. IT IS ORDERED: to separate and to return and resume deliberations on April 7, 1998 at 9:00 a.m.

[] Verdict Rec'd at for:

[] Plaintiff
[] Defendant

[X] Civil trial ended.

IT IS ORDERED:

[] Clerk file Verdict and enter Judgment.

[] Clerk file Verdict, but withhold entry of Judgment until further order.

CLERK'S USE ONLY:

(X) Number of Trial Days with Evidence – 6 Days.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

JUDDS BROS. CONSTRUCTION COMPANY, Plaintiff, v. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant.	)	4:CV95-3113 COURT'S CHARGE TO THE JURY (Filed April 7, 1998)

INSTRUCTION NO. 1

Now that you have heard the evidence and the arguments of counsel, it is my duty to inform you of the legal principles and considerations you are to use in arriving at a proper verdict.

In accordance with the oath which each of you took when you were selected as jurors to try this case, it is your duty to determine the disputed issues of fact in this case from the evidence produced and seek thereby to reach a verdict which shall speak the truth of the case and thereby do justice between the parties hereto, uninfluenced by sympathy, favor, affection or prejudice for or against any party. It is your duty to receive and accept as correct the law as given you in this charge, and you are not privileged to entertain an opinion as to the law or what the law should be which conflicts in any respect with the law as stated in this charge. However, I have not attempted to embody all the law applicable to this case in

any one of the instructions contained in this charge, and therefore, you must consider the charge in its entirety, giving due weight to each instruction, and construing each instruction in the light of, and in harmony with, the other instructions, and so apply the principles set forth to all of the evidence received during the trial.

INSTRUCTION NO. 2

At the outset, I urge you to make every effort to reach an agreement in your deliberations. Inconclusive trials are not desirable. A common understanding among competent and intelligent people ought to be possible.

However, this observation must not be construed by any juror as a suggestion of the abandonment of an opinion held understandably and earnestly, just for the sake of agreement. The Court must never coerce agreements by jurors. It is appropriate to suggest that if you should find yourselves in apparent disagreement, each of you should carefully reexamine your opinions before assuming a position of dissent.

I should give you one preliminary word of caution. It is seldom wise or beneficial for a juror to make an emphatic expression of his or her opinion of the case, or to announce a determination to stand for a certain verdict, immediately upon entering the jury room at the beginning of deliberations. The reason for this is obvious.

We are all human, and it is difficult to recede from a position once it has been firmly and definitely stated.

INSTRUCTION NO. 3

Corporations are entitled to the same fair trial at your hands as a private individual. All persons stand equal before the law and are to be dealt with as equals in a court of justice.

A corporation can act only through its employees or agents. A corporation is bound by the acts or omissions of its employee or agent when such acts or omissions occur within the scope of the duties of such employee or agent.

You are instructed that William Glavin, as Burlington's chief engineer, had the authority to act on behalf of and to bind Burlington with regard to any contractual or settlement agreement entered into with Judds on January 16, 1990.

INSTRUCTION NO. 4

During the trial I have ruled on objections to certain evidence. You must not concern yourselves with the reason for such rulings since they are controlled by rules of law.

You must not speculate or form or act upon any opinion as to how a witness might have testified in answer to questions which I have rejected during the trial, or upon any subject matter to which I have forbidden inquiry.

In coming to any conclusion in this case, you must be governed by the evidence before you and by the evidence alone.

You have no right to indulge in speculation, conjecture or inference not supported by the evidence.

The evidence from which you are to find the facts consists of the following: (1) the testimony of the witnesses; (2) documents and other things received as exhibits; and (3) any facts that have been stipulated – that is, formally agreed to by the parties.

The following things are not evidence: (1) statements comments, questions and arguments by lawyers for the parties; (2) objections to questions; (3) any testimony I have stricken from the record or told you to disregard; and (4) anything you may have seen or heard about this case outside the courtroom.

INSTRUCTION NO. 5

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other

words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

You have heard the terms "direct evidence" and "circumstantial evidence." You are instructed that you should not be concerned with those terms since the law makes no distinction between the weight to be given to direct and circumstantial evidence.

INSTRUCTION NO. 6

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In determining the weight to be given to the testimony of the witnesses, you should take into consideration their interest in the result of the suit, if any appears, their conduct and demeanor while testifying, their apparent fairness or bias, their relationship to the parties, if any appears, their opportunities for seeing or knowing and remembering the things about which they testified, the reasonableness or unreasonableness of the testimony given by them, any previous statement or conduct of the

witness that is consistent or inconsistent with the testimony of the witness at this trial, and all of the evidence, facts, and circumstances proved which tend to corroborate or contradict such evidence, if any appear. You are not bound to take the testimony of any witness as true, and should not do so if you are satisfied from all the facts and circumstances proved at the trial that such witness is mistaken in the matter testified to, or that for any other reason appearing in the evidence, the testimony is untrue or unreliable.

The fact that one side may have used a greater number of witnesses or presented a greater quantity of evidence should not affect your decision. Rather, you should determine which witness or witnesses, and which evidence appears accurate and trustworthy. It is the weight of the evidence that counts – not the number of witnesses.

The testimony of a single witness which produces in your minds belief in the likelihood of truth is sufficient for proof of any fact, and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary if, after consideration of all of the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

INSTRUCTION NO. 7

During the trial in this case, certain testimony has been presented to you by way of deposition, consisting of sworn recorded answers to questions asked of the witness by attorneys for the parties in the case. Such testimony is entitled to the same consideration and is to be judged as to credibility, and weighed, and otherwise considered by the jury in the same way as if the witness had been present, and had testified from the witness stand.

INSTRUCTION NO. 8

You have heard testimony from persons described as experts. Persons who, by education and experience, have become expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion and all the other evidence in the case.

INSTRUCTION NO. 9

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, and other documents which are in evidence in the case. However, such charts or summaries are not in and of themselves evidence or proof of any facts. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

INSTRUCTION NO. 10

The parties to this action are Judds Brothers Construction Company and Burlington Northern Railroad Company. Throughout these instructions, Judds Brother Construction Company shall be referred to as the plaintiff or as Judds, and Burlington Northern Railroad Company shall be referred to as the defendant or as Burlington.

INSTRUCTION NO. 11

In determining whether a party to this action has sustained its burden of proof, you are not limited to the evidence introduced by that party. Any party to the case

is entitled to the benefit of any evidence tending to establish its contention, even though such evidence comes from witnesses presented by the other party.

INSTRUCTION NO. 12

It is appropriate at this time to define certain terms which may appear from time to time in this charge.

By a "preponderance of the evidence" is meant the greater weight of credible evidence; that is not determined by the greater number of witnesses testifying in relation to the facts and circumstances, but that amount of evidence which on the whole, when fully, fairly and impartially considered, makes the stronger impression on your mind and is more convincing as to its truth when weighed against the evidence in opposition thereto. If the evidence is equally balanced, a preponderance is not established.

A "proximate cause" is a cause that produces a result in a natural and continuous sequence, and without which the result would not have occurred. This does not mean that the law recognizes only one proximate cause of an injury or damage consisting of only one factor or thing, or of the conduct of only one person. On the contrary, many factors, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such a case, each may be a proximate cause. Where the independent acts or failures to act of more than one person combine to

proximately cause the same injury, each such act or failure to act is a proximate cause, and each such person may be held responsible for the entire injury.

INSTRUCTION NO. 13

I shall now explain the claims made by the parties which are pertinent to your deliberations.

In this case Judds claim that Burlington breached part of the Agreement which Judds and Burlington entered into in January of 1990 to settle litigation arising from a construction project Judds was performing for Burlington at the Gibson Yards in Omaha, Nebraska.

Judds claims that in addition to Exhibit 81, the parties agreed that Burlington would reinstate Judds as a supplier of construction services to Burlington, and as such a supplier, Judds would be given the opportunity to bid on all Burlington construction projects Judds could feasibly perform and that Judds would be awarded the contract on those construction projects if it was the low bidder.

Judds claims Burlington breached the Agreement by precluding Judds from bidding on Burlington construction projects Judds was capable of performing and by not awarding Judds the contract for construction of the Grand Island grade separation project and the Hobson Yards freight pit project.

Judds claim [sic] that Burlington breached its duty of good faith and fair dealing by not taking steps to insure that Judds' contractual rights under the Settlement Agreement were not injured or denied.

Judds claims that it was damaged as a proximate result of Burlington's breach, and it seeks judgment against Burlington for these damages.

Burlington admits that it entered into the Settlement Agreement with Judds as set forth in Exhibit 81, and that pursuant to paragraph D of Exhibit 81 it prepared and sent to plaintiff a letter dated January 22, 1990, Exhibit 85. Burlington also admits that Judds submitted bids for the Grand Island grade separation project and the Hobson Yard freight pit project and that Judds was the lowest bidder for the Hobson Yards freight pit project.

Burlington denies that it agreed that it would reinstate Judds as a supplier of construction services to Burlington for any definite or indefinite period of time. Burlington denies that Judds would be given the opportunity to bid on all Burlington construction projects Judds could feasibly perform, and also denies that it is required to award contracts to Judds on any construction projects.

Burlington claims it did not award Judds the contract for the Grand Island grade separation project because the Judds' bid exceeded the budget established for the project, and that, after the project was redesigned, the Judds' bid was not the low bid. Burlington also claims that the contract for the Hobson Yards freight pit project was awarded to another contractor whose bid exceeded Judds' bid because Burlington engineers believed the

other contractor would do a better job of meeting the plans and specifications on time.

You must understand, members of the jury, that the foregoing summary constitutes only a brief analysis of the claims made respectively by the parties in this case and must not be taken or considered by you as any evidence in this case.

INSTRUCTION NO. 14

When Burlington invites bids on a construction project contract and receives bids in response to that invitation, Burlington has the right as a matter of law to reject any or all of the bids for any reason unless Burlington is otherwise contractually bound to accept a certain bid.

INSTRUCTION NO. 15

Before the plaintiff can recover against the defendant, the plaintiff must prove, by a preponderance of the evidence, each of the following elements:

1. That Agreement to settle the Gibson Yards litigation included each of the following terms:

   (a) that Judds would continue to be a supplier of construction services to Burlington;

(b) that Judds would be given the opportunity to bid on all Burlington construction projects Judds could feasibly perform; and

(c) that Burlington would award Judds the contract on construction projects on which Judds was the low bidder;

2. That the defendant breached the Agreement in one or more of the following ways:

(a) by not awarding Judds the construction contract for the Grand Island grade separation project, or

(b) by not awarding Judds the construction contract for the Hobson Yards freight pit project;

3. That this breach was a proximate cause of some actual damage to the plaintiff; and

4. The nature and extent of such actual damage.

If the plaintiff has *not* proved each of these four elements by a preponderance of the evidence, then your verdict must be for the defendant.

If the plaintiff *has* proved each of these four elements by a preponderance of the evidence, then your verdict must be for the plaintiff.

INSTRUCTION NO. 16

Every contract contains a duty of good faith and fair dealing. This duty requires the parties to a contract to

perform in a manner that furthers the agreed common purpose of the contract. Neither party may intentionally injure or deny the rights of the other party to receive the benefits that party is entitled to under the contract.

INSTRUCTION NO. 17

You may consider the provisions of Exhibit 81 and Exhibit 85 in deciding what the Agreement and intentions of the parties were on January 16, 1990 and, where an ambiguity exists in the terms of either of these exhibits, you should construe the agreement against the preparer, in this case Burlington.

INSTRUCTION NO. 18

If you find in favor of Judds on its breach of contract claim, then you must determine the amount of plaintiff's actual damages. "Actual damages" are damages sustained as a result of real loss or injury. Monetary loss is not the only form of actual damages.

In this case, you may find that plaintiff suffered actual damages if you find that plaintiff suffered any loss, detriment or harm, including the reasonable value of the profits it has lost, proximately caused by defendant's failure to award Judds the construction contract on either

or both of the Grand Island grade separation project or the Hobson Yards freight pit project.

In computing actual damages, you may not rely on speculation, guess work or conjecture, however, mathematical certainty or unrealistic exactitude is not required. Additionally, you must not award any damages for Burlington's alleged failure to give Judds the opportunity to bid on certain projects or by way of punishment or through sympathy.

INSTRUCTION NO. 19

In the trial of this case and in this charge, I have in no way attempted to express my opinion as to who should prevail upon the issues submitted to you. You must not construe any statement, action, or ruling on my part in the trial of this case as an indication of any opinion on my part respecting the proper course of your verdict. During the course of a trial, I occasionally ask questions of a witness in order to bring out facts not fully covered in the testimony. Do not assume that I hold any opinion on the matters to which the questions related.

So regardless of what I may have chosen to say, I must admonish you that you are the sole judges of the facts, and your verdict must respond to your own conclusions from the evidence.

INSTRUCTION NO. 20

Upon your retirement to the jury room, first select one of your number to be foreperson to preside over your deliberations and who will sign the verdict form. You will then begin your study and deliberations of the case.

In arriving at your verdict, I admonish you that it must be unanimous. Short of unanimity, you cannot consider that you have reached any verdict.

If it becomes necessary during your deliberations to communicate with the Court, dial 5227 on the telephone to signal this office. Then your foreperson may deliver a note to the Judge. Bear in mind you are not to reveal to the Court or to anyone else how the jury stands, numerically or otherwise, until you have reached a unanimous verdict.

Upon arriving at your verdict and completion of the verdict form by the foreperson, you will have concluded your task and you will notify the Judge.

As the Judge presiding over the trial, I shall be available throughout the remainder of the day and until your verdict is returned, and I shall receive it promptly upon its return.

If you do not arrive at your verdict during the present court day, you will continue deliberations until you do, with allowance of time for meals and with an intermission between 5 p.m. today and 9 a.m. tomorrow morning. During the time allotted for meals and night's rest, you will be permitted to separate, but you should return promptly at the time set for continuation of your deliberations. During the periods of your separation, you should

keep in mind the admonitions of the Court concerning your conduct while separated.

A verdict form has been prepared and will be taken with you when you retire for your deliberations. This form will be adequate for the expression of any verdict you may properly agree upon. Only your foreperson will date and sign the verdict.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

JUDDS BROS. CONSTRUCTION COMPANY, Plaintiff, v. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant.	4:CV95-3113 VERDICT FORM (Filed Apr. 7, 1998)

1) Did Judds prove by a preponderance of the evidence the terms of the Agreement as set forth in element 1 of Instruction No. 15?

X YES _ NO

If your answer to question number one is "NO," then your deliberations are complete and your foreperson should sign and date this verdict form. If your answer to question number one is "YES," then proceed to answer the following questions.

2) Did Judds prove by a preponderance of the evidence that Burlington breached the Agreement by not awarding Judds the construction contract for the Grand Island grade separation project?

X YES _ NO

If your answer to question number two is "NO," then proceed directly to question number four. If your answer to question number two is "YES," then proceed to question number three.

3) What amount, if any, of actual damages did Judds sustain as a proximate result of Burlington's failure to award Judds the construction contract for the Grand Island grade separation project?

$704521.05

4) Did Judds prove by a preponderance of the evidence that Burlington breached the Agreement by not awarding Judds the construction contract for the Hobson Yards freight pit project?

X YES _ NO

If your answer to question number four is "NO," then your deliberations are complete and your foreperson should sign and date this verdict form. If your answer to question number one is "YES," then proceed to question number five.

5) What amount, if any, of actual damages did Judds sustain as a proximate result of Burlington's failure to award Judds the construction contract for the Hobson Yards freight pit project?

$86711.00

DATED this 7th day of April, 1998.

/s/ Lucinda D. McCarter
FOREPERSON

The jury has reached a verdict.

/s/ Lucinda D. McCarter

Foreperson

April 7, 1998

1558

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUDDS BROTHERS CONSTRUCTION COMPANY, Plaintiff, vs. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant.	Case Number 4:95CV3113 **COURT MINUTES CIVIL JURY TRIAL** Date: April 7, 1998 Deputy: Cathy J. Scigo Reporter: Trial Commenced: 9:00 a.m. Trial Concluded: 4:30 p.m.

Trial before Judge Lyle E. Strom, United States District Court, at Lincoln, Nebraska.

APPEARANCES: For Plaintiff: William Dittrick; John J. Jolley
For Defendant: Rodney Confer; Corey Stull

PROCEEDINGS:

[] Civil trial resumed.

[] Jury empaneled (File list of jurors).

[] Opening statements.

[] Evidence by [] Plaintiff [] Defendant.

[] Plaintiff rests. [] Defendant rests.

[] Closing arguments.

[] Instruction conference.

[] Trial not concluded – continued to.

[] Jury received case at

[X] Jury Resumed deliberations on April 7, 1998 at 9:00 a.m.

[] Jury returned at without verdict. IT IS ORDERED: to separate and to return and resume deliberations on

[X] Verdict Rec'd at 4:00 p.m. for:

[X] Plaintiff
[ ] Defendant

[] Civil trial ended.

IT IS ORDERED:

[ ] Clerk file Verdict and enter Judgment.

[X] Clerk file Verdict, but withhold entry of Judgment until further order.

CLERK'S USE ONLY:

() Number of Trial Days with Evidence –

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUDDS BROTHERS CONSTRUCTION, COMPANY,	)	
Plaintiff,	)	4:95CV3113
v.	)	JUDGMENT
BURLINGTON NORTHERN RAILROAD, COMPANY,	)	(Filed Apr. 10, 1998)
Defendant.	)	

This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the Plaintiff, Judds Brothers Construction Company and against Defendant, Burlington Northern Railroad Company, in the amount of $791,232.05 together with the Plaintiff's costs herein.

Dated this 10th day of April, 1998.

GARY D. MCFARLAND
Clerk of Court

By /s/ Cathy J. Scigo
Cathy J. Scigo
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, vs. ATLAS COMPANY OF LINCOLN, a Nebraska Corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska Corporation, Defendants.	Case No. 4:CV95-3113 **BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR IN THE ALTERNATIVE FOR A NEW TRIAL** (Filed Apr. 15, 1998)

Pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, Defendant Burlington Northern and Santa Fe Railway Company ("BNSF") renews its request for judgment as a matter of law made at the close of Plaintiff's case and close of all the evidence for the reason that there is no legally sufficient evidentiary basis for a reasonable jury to find for Plaintiff. Specifically, Defendant respectfully shows the Court the following:

(a) There was no legally sufficient evidence which would allow a jury to conclude that the parties' settlement agreement of January 16, 1990, included a term that Burlington Northern was required to allow Plaintiff to bid on future contracts;

(b) There was no legally sufficient evidence that the parties' settlement agreement of

January 16, 1990, and the letter of January 22, 1990, included a term that required Burlington Northern to allow Plaintiff to Bid on future contracts;

(c) There was no legally sufficient evidence that the parties' settlement agreement of January 16, 1990 or the letter of January 22, 1990, included a term that Burlington Northern was required to award any contract to Plaintiff on which it was the low bidder;

(d) There was no legally sufficient evidence that the parties' settlement agreement of January 16, 1990, included an oral agreement that Burlington Northern and Santa Fe was required to award Plaintiff any contract upon which it was the low bidder;

(e) There was no legally sufficient evidence that BNSF breached the parties' settlement agreement by not awarding Plaintiff the contract for the Grand Island grade separation project;

(f) There was no legally sufficient evidence that BNSF breached the parties' settlement agreement by not awarding Plaintiff the contract for the Lincoln freight pit refueling project;

(g) There was no legally sufficient evidence of lost profits sustained by the Plaintiff as a proximate result of not being awarded the Grand Island grade separation project contract; and

(h) There was no sufficient proof that Plaintiff sustained lost profits as a proximate result

of not being awarded the contract for construction of the Lincoln freight pit project.

Wherefore, Burlington Northern and Santa Fe Railway Company prays for entry of judgment in its favor herein, and for dismissal of Plaintiff's counterclaim at Plaintiff's costs, and for such other and further relief as the Court deems appropriate in the premises.

In the alternative, pursuant to Rule 59 of the Federal Rules of Civil Procedure, Defendant Burlington Northern and Santa Fe Railway Company moves for a new trial in this action on the following grounds:

(a) That the verdict is not sustained by sufficient evidence;

(b) That the verdict is contrary to law;

(c) Errors of law which occurred at the trial and were duly excepted to by the undersigned;

(d) Misconduct of the jury which deprived Defendant of a fair trial;

(e) The Court erred in giving Instruction No. 15 to the jury, which was tendered in part by the adverse party, and in part given by the Court on its own motion; and

(f) The Court erred in giving Instruction No. 17 tendered by the adverse party.

A Memorandum Brief in support of this Motion has been filed with the Court.

Dated this 15th day of April, 1998.

BURLINGTON NORTHERN
RAILROAD COMPANY,
Defendant

By: KNUDSEN, BERKHEIMER,
RICHARDSON & ENDACOTT
1000 NBC Center
1248 "O" Street
Lincoln, Nebraska 68508
(402) 475-7011

By: /s/ Rodney M. Confer – #10753
One of Said Attorneys

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and correct copy of the foregoing **Burlington Northern and Santa Fe Railroad Company's Motion for Judgment as a Matter of Law or in the Alternative for a New Trial** to be served on William G. Dittrick and Michael D. Daley, 1500 Woodmen Tower, Omaha, NE 68102, by First Class United States mail, sufficient postage prepaid on this 15th day of April, 1998.

/s/ Rodney M. Confer
Rodney M. Confer

IN THE UNITED STATES DISTRICT COURT
OF THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, vs. ATLAS COMPANY OF LINCOLN, a Nebraska Corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska Corporation, Defendants.	4:CV95-3113 **NOTICE OF APPEAL** (Filed Jun. 19, 1998)

Notice is hereby given that Judds Brothers Construction Company, Defendant in the above-named case, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the final judgment of the United States District Court for the District of Nebraska entered in this action on the 3rd day of June, 1998, wherein the court granted Plaintiff's motion for judgment as a matter of law and set aside the jury's verdict in the amount of $791,232.05 in favor of the Defendant.

Dated this 19 day of June, 1998.

JUDDS BROTHERS
CONSTRUCTION COMPANY,
Defendant-Appellant

By: /s/ William G. Dittrick
William G. Dittrick (#11024)
John J. Jolley, Jr. (#20726)

Of BAIRD, HOLM, MCEACHEN, PEDERSEN, HAMANN & STRASHEIM
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 344-0500

Its Attorneys

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing Notice of Appeal was served by regular United States mail, postage prepaid, on the 19 day of June, 1998 upon the following:

Rodney Confer, Esq.
Knudsen, Berkheimer, Richardson, Endacott & Routh
1000 NBC Center
Lincoln, Nebraska 68508-1474

/s/ Willaim G. Dittrick
William G. Dittrick

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

AMENDED ORDER

No. 98-2678NEL

Burlington Northern Railroad Company, a Delaware corporation,	*	
Appellee,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
v.	*	
Atlas Company, of Lincoln, Nebraska corporation;	*	
Defendant,	*	
Judds Brothers Construction Company, Nebraska corporation,	*	
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge C. Arlen Beam took no part in the consideration of the petition.

(5128-010199)

August 26, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, vs. ATLAS COMPANY OF LINCOLN, a Nebraska Corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska Corporation, Defendants.	4:CV95-3113 **APPELLANT'S ORDER OF TRANSCRIPT PURSUANT TO FED. R. APP. P. 10(b)** (Filed Jun. 19, 1998)

TO: ROGENE SCHRODER, Matheson & Taulborg, 7602 Pacific Street, Omaha, Nebraska 68114, (402) 397-9669

Pursuant to FED. R. APP. P. 11(b), you are hereby requested to prepare a transcript of all parts of the trial of the above-referenced proceeding not already on file. Please supply counsel for Defendant-Appellant a copy of the same.

Cost of preparation of the transcript and for the copy shall be paid upon submission of a billing statement by Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, counsel for Defendant-Appellant.

DATED THIS 19 day of June, 1998.

JUDDS BROTHERS CONSTRUCTION COMPANY, Defendant-Appellant

By: /s/ William G. Dittrick
William G. Dittrick (#11024)
John J. Jolley, Jr. (#20726)

of BAIRD, HOLM, McEACHEN, PEDERSEN, HAMANN & STRASHEIM
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 344-0500

Its Attorneys

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above Appellant's Order of Transcript Pursuant to FED. R. APP. P. 10(b) was served by regular United States Mail, postage prepaid, on this 19 day of June, 1998, to the following:

Rogene Schroder
Matheson & Taulborg
7602 Pacific Street
Omaha, Nebraska 68114

Rodney Confer, Esq.
Knudsen, Berkheimer, Endacott & Routh
1000 NBC Center
Lincoln, Nebraska 68508-1474

/s/ William G. Dittrick

IN THE UNITED STATES DISTRICT COURT
OF THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, vs. ATLAS COMPANY OF LINCOLN, a Nebraska Corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska Corporation, Defendants.	4:CV95-3113 **PROOF OF SERVICE** (Filed Jun. 19, 1998)

The undersigned hereby certifies that on June 19, 1998, a true and correct copy of Appellant's Form A with attachment (Partial List of Issues On Appeal), an original of Appellee's Form B, and a copy of the Notice of Appeal filed herein was sent by regular United States mail, first class postage prepaid, to the following:

Rodney Confer, Esq.
Knudsen, Berkheimer, Richardson,
Endacott & Routh
1000 NBC Center
Lincoln, Nebraska 68508-1474

Dated this 19 day of June, 1998.

JUDDS BROTHERS CONSTRUCTION COMPANY, Defendant-Appellant

By: /s/ William G. Dittrick
William G. Dittrick (#11024)
John J. Jolley, Jr. (#20726)

of BAIRD, HOLM, McEACHEN, PEDERSEN, HAMANN & STRASHEIM
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 344-0500

Its Attorneys

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, vs. ATLAS COMPANY OF LINCOLN, a Nebraska Corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska Corporation, Defendants.	4:CV95-3113 **APPELLANT'S DESIGNATION OF EXHIBITS PURSUANT TO 8TH CIR. R. APP. P. 30A(b)(5)** (Filed Jun. 19, 1998)

Defendant-Appellant, Judds Brothers Construction Company, pursuant to 8TH CIR. R. APP. P. 30A(b)(5), hereby designates as a part of the record on appeal all exhibits accepted into evidence at the trial of this matter.

The District Court Clerk is requested to retain such designated exhibits until such time the Clerk of the United States Court of Appeals for the Eighth Circuit requests transmittal of the same.

DATED THIS 19 day of June, 1998.

JUDDS BROTHERS CONSTRUCTION COMPANY, Defendant-Appellant

By: /s/ William G. Dittrick
William G. Dittrick (#11024)
John J. Jolley, Jr. (#20726)

of BAIRD, HOLM, McEACHEN, PEDERSEN, HAMANN & STRASHEIM
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 344-0500

Its Attorneys

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above Appellant's Designation of Exhibits Pursuant to 8TH FED. R. APP. P. 30A(b) (5) was served by regular United States Mail, postage prepaid, on this 19 day of June, 1998, to the following:

Rodney Confer, Esq.
Knudsen, Berkheimer, Richardson,
Endacott & Routh
1000 NBC Center
Lincoln, Nebraska 68508-1474

/s/ William G. Dittrick

EXHIBIT 81

[LOGO] BURLINGTON NORTHERN RAILROAD

[Name And Address Omitted In Printing]

January 16, 1990

Mr. Ray Judds
Judds Brothers Construction Company
3835 North 68th Street
Lincoln, NE 68507

Dear Mr. Judds:

Burlington Northern vs Judds Brothers Construction Company
Judds Brothers Construction Company vs Burlington Northern

This will confirm an understanding you and I reached today to settle all litigation and claims arising out of the construction of the Gibson Yard Intermodal facility at Omaha, Nebraska, It is agreed as follows:

A) Burlington Northern will satisfy all outstanding claims for material furnished for this job. Consolidated Mixing will be paid in the full amount outstanding (approximately $87,000.00).

B) Burlington Northern will pay Judds Brothers the sum of $250,000.00.

C) All claims are released and all litigation dismissed in any way arising out of the project without further cost or expense to either party. The lawyers will take the action necessary to accomplish this.

D) I will write you a letter indicating that the litigation here resulted from a misunderstanding between the parties and that the controversy has been resolved to the mutual satisfaction of Burlington Northern and Judds Brothers.

E) Representatives of both parties will keep the settlement terms strictly confidential.

If the above terms are acceptable to Judds Brothers please indicate by signing on the line below and returning one copy to me.

Yours very truly,

/s/ William E. Glavin
William E. Glavin

ACCEPTED: /s/ Ray Judds
Ray Judds

EXHIBIT 84

[LOGO] BURLINGTON NORTHERN RAILROAD

LAW DEPARTMENT

[Address Omitted In Printing]

TELEFAXED

January 11, 1990

William G. Dittrick
Baird, Holm, McEachen, Pedersen,
Hamann & Strasheim
1500 Woodmen Tower
Omaha, Nebraska 68102-2069

Re: Burlington Northern v. Judds Bros. Construction Co.;

Dear Mr. Dittrick:

I have your letter of January 10, 1990, with respect to this litigation. While I appreciate your kind words with respect to my initiative in attempting to reach a settlement in this case, I have come to the conclusion that both you and I stand in the way of progress. You ask me, for instance, what projects are out there that would be suitable for Judds Bros., and I do not know other than the continuation of the tie rehabilitation program beyond 1992. In turn, each time I bring up settlement to you, it takes at least a week for you to respond and I judge that as because of a need for you to contact your client.

Therefore, I propose that Ray Judds and Bill Glavin meet, one-on-one with no lawyers or anyone else present, to see if they are able to reach some understanding. Please communicate this proposal to your client *immediately* so

that if it is acceptable, the meeting can be held promptly. We continue to expend funds for legal services and litigation support. Toward that end, this letter is telecopied to you.

Very truly yours,

/s/ Richard V. Wicka

Richard V. Wicka
General Counsel
Litigation/Claims

EXHIBIT 85

[LOGO] BURLINGTON NORTHERN RAILROAD

[Name And Address Omitted In Printing]

TO WHOM IT MAY CONCERN:

Please be advised that all litigation surrounding the Intermodal Hub Construction Project at Burlington Northern's Gibson Yards in Omaha, Nebraska, has been settled to the satisfaction of the parties. The lawsuits associated with this project arose from a misunderstanding of properties and capabilities of Roller Compacted Concrete; specifically in conjunction with adverse subgrade moisture conditions.

Judds Brothers Construction continues to be a supplier of construction services to the Burlington Northern Railroad. Judds has also provided tie rehabilitation service to the Burlington Northern since 1987.

Sincerely,

/s/ William E. Glavin

File: 142663

Supreme Court, U.S.
FILED
NOV 15 1999
OFFICE OF THE CLERK

(2)

99 828

No. _____

In The

Supreme Court of the United States

JUDDS BROTHERS CONSTRUCTION COMPANY,
Petitioner,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME II, PAGES 139 TO 359

WILLIAM G. DITTRICK, ESQ.
Counsel of Record
JOHN J. JOLLEY, JR., ESQ.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff,	:	Case No. 4:CV95-3113 March 30, 1998 11:22 a.m. Lincoln, Nebraska
vs.	:	
ATLAS COMPANY OF LINCOLN, A Nebraska corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska corporation, Defendants.	:	

VOLUME I
TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE LYLE E. STROM
UNITED STATES DISTRICT COURT SENIOR JUDGE

* * *

[p. 5] I think that I share Mr. Dittrick's concern that if they strike Mr. Dorsey that this is going to reflect adversely on them or in the minds of the rest of the jurors, et al. I have spoken at some length with the jury during the preliminary charge to them with respect to their duty as jurors and the process of striking jurors and not to receive any – or form any opinions or conclusions about why they were stricken and that frequently they're stricken simply because three people have to be stricken on each side.

In view of the answers that he's given to the questions when he was – as I say, I think he was examined very thoroughly by Mr. Dittrick, and he was examined also by the court, that the defendant – that the witness – or that the juror I believe can – has demonstrated that he can be a fair and impartial juror in this case, and there's no showing that he should be struck for cause on the basis of his response simply because he's employed by Burlington Northern. I'm going to deny the motion to strike.

Okay. You may bring the jury back in now, and we will – parties will enter their preemptory challenges.

(The jury was present at 11:30 a.m.)

(At 11:40 a.m. the following proceedings were had outside the presence of the jury:)

THE COURT: On the record. This morning I held a conference in chambers with counsel regarding two Motions in [p. 6] Limine that have been filed by Burlington Northern. For ease of reference after that, I'm going to refer to Judds – Judds Brothers construction Company as the plaintiff and Burlington Northern Railroad Company as the defendant since that's the posture they're going to have during the course of this trial, and the defendant had filed two Motions in Limine.

The – One of them seeks the – an order from the Court directing plaintiff's counsel to instruct the plaintiff's witnesses – having plaintiff's counsel instruct plaintiff's witnesses that no reference should be made to the extrinsic evidence that may contradict or add terms to the

1990 settlement agreement. Whether or not these contracts are – this contract is so clear and unambiguous as to not be subject – as to require that any evidence which would vary or alter its terms be kept from the jury I think poses a very serious question to the Court – for the Court in this case, because as I look at the agreement of January 16, 1990, which is the principal settlement agreement, I have difficulty seeing any conflict or any ambiguity in the terms of that contract as it reads.

The – the concern that the court has, however, is with respect to paragraph d which calls for the writing of a letter and a letter was subsequently written. It's dated January 22, 1990, and it has language in it that to the effect – and rather than – it reads Judds – Judds Brothers [p. 7] Construction continues to be a supplier of construction services to the Burlington Northern Railroad. Is that language subject to extrinsic evidence to explain what the parties mean? This letter obviously is the letter that was written in response to the requirements set forth in paragraph d of the settlement agreement, and I'm concerned that there may be an issue of clarification needed with respect to this paragraph as to what the parties meant by the use of that language, and so I have concluded that I will permit the parties to present evidence as to what the discussions between them were with respect to the settlement insofar as it relates to this particular letter and what the – and what the parties, in fact, discussed and what their understanding of continuing – that Judds Brothers Construction – Construction continues to be a supplier of construction services to Burlington Northern Railroad.

It seems to me that in – in part the ultimate decision of this court as it relates to the issues to be submitted to

this jury and to the scope of these contracts is going to be – under the circumstances and the manner in which these contracts came about and this letter came about are going to be – it requires that the Court have more evidence before it than it does right now, and that is not to say that at the close of the plaintiff's case, I may conclude that the contract is – is unambiguous and the evidence does [p. 8] not support as it were a – finding that it's ambiguous or does not mean what it says, but I'm going to permit the plaintiffs to go forward and put into evidence the discussions that took place in – in Kansas or Missouri, I'm – I'm not sure exactly which, but when Mr. Judds went down to settle the prior litigation which gave rise to the settlement agreement of January 16, 1990.

That in a sense also gives rise to the – or takes us to the second Motion in Limine which again is filed by Burlington Northern seeking an order from the Court prohibiting the plaintiffs in this case from making any reference to issues of fact or liability with regard to the lawsuit involving the Gibson Yards project which as I understand it, that was the underlying litigation or the underlying contract that gave rise to the litigation back in the '80s that resulted in the settlement agreement of January 16, 1990. It seems to me some of that background is probably necessary, and to a limited extent, I'm just going to have to sort of play that by ear a little bit.

I'm going to allow the plaintiffs to at least set the stage as it were for the settlement agreement that was entered into and the ultimate letter that was sent out by Burlington Northern in response to paragraph d of that settlement agreement.

And I believe that I still have some difficulty, [p. 9] Mr. Dittrick, with the – with reference to the claim of the plaintiff in this case against the defendant because of the settlement and the claim for indemnification the settlement of the case that was back in Ohio or –

MR. CONFER: Illinois, Your Honor.

THE COURT: – in Illinois. I'm still having difficulty understanding the – what relevance that has to the resolution of the issues which give rise to this lawsuit, and so for the record I'm going to give – I'd like to have you again state your position on that so that I can be in a position better to make that determination.

MR. DITTRICK: Our position is, Judge, that the contract agreement settling the prior lawsuit was made in January of 1990. Thereafter, Judds was trying to enter into more contracts with the Burlington. A large contract was negotiated with the Burlington in 1992 and in 1993 it was actually granted to Judds Brothers from the Burlington. However, in April of 1993, the Burlington sent a letter to Judds Brothers, and in the letter Burlington Northern referenced that the Burlington Northern had been sued by one of its employees, an individual by the name of Buddy Stanley, and the Burlington was going to settle that lawsuit for $250,000. The letter further indicated that Mr. Stanley was injured when he was unloading railroad ties in Illinois.

Those railroad ties had been banded by Judds

* * *

[p. 50] DIRECT EXAMINATION

BY MR. DITTRICK:

Q. Will you state your name, please, Mr. Judds.

A. Raymond Eugene Judds.

Q. And, Mr. Judds, when were you born?

A. I was born on February 14th, 1928.

Q. And for the last 40 some odd years, what's your job been?

A. I've been president of Judds Brothers Construction Company doing general contracting work.

Q. And when did you cease being president of Judds Brothers Construction Company?

A. I'm not certain on the date. Possibly five, six years ago.

Q. And who took over as president then?

A. My son John.

Q. And who's chairman of the board?

A. I'm chairman of the board.

[p. 51] Q. Would you tell the ladies and gentlemen of the jury whether or not you're married.

A. I'm married.

Q. How many children do you have?

A. I have four children. I have – I'm celebrating my 50th anniversary this year.

Q. And how many of your children work for Judds Brothers?

A. Two children.

Q. Now, Mr. Judds, tell us a little bit about the type of work that Judds Brothers has done over the past 30, 40 years.

A. Judds Brothers has been in the – started out in the home building era in the '50s, and then they graduated up into building – our first large job was the Lincoln Telephone and Telegraph Company job on 21st and L Street and that was in 1956, and from that date on we were a general contractor. We went into that field and quit building homes. I think we might have built one or two homes after that, but we limited our home building, so we went into the general contracting of concrete, steel, the railroad work, the work that we did for Archer Daniel Midland and millwright work. The Crete Mills and those kinds of customers that we worked for after that date.

Q. Does Judds Brothers do what's commonly called utility-type construction work?

A. Yes. We started Atlas Company of Lincoln, and we're [p. 52] doing underground utility work. We did a sizable amount of work here in Lincoln, Nebraska and outside of the city of Lincoln putting in underground utilities such as sewers, water for municipalities.

Q. Mr. Judds, back around 1984, 1985, did Judds get involved in a type of concrete called roller-compacted concrete?

A. Yes. We had just – We were successful bidder to the Burlington Northern at Denver at the Rennick Yards

to build a – a sizable roller-compacted concrete piggyback assembly that – Burlington was going into the piggyback business where they would serve the – the trucking units and haul the goods on the rail stock that they had and deliver them to certain points across the nation, and then the – the – the units would be distributed from those intermodals. We were the – the low bidder on the job at the Rennick Yards in Denver, Colorado, and I think the bid was something about 11 or $12,000,000. Roller-compacted concrete is a method that's fairly new in the business of putting down surface – a hard surface, and it's a product that requires good subbase so you can put the material – vibrate the material down. It's a very dry concrete. It lacks water. The less water you use in concrete, of course, it gives you the strength, and when – it is easy to put down. We had to buy special equipment –

[p. 53] MR. CONFER: Your Honor, I'd object to the narrative testimony.

THE COURT: Sustained.

BY MR. DITTRICK:

Q. When Judds was involved in – got involved in roller-compacted concrete, did it buy special equipment?

A. Yes. We bought special equipment. It was made in Germany and it required about $500,000 for this particular equipment that we bought.

Q. And what – what was this piece of equipment you bought?

A. It was a – similar to a lay-down machine that is used in asphalt, but it had vibratory parts to it that made

it so you could compact the concrete – the dry concrete and get your compaction and get your strength.

Q. I refer to an intermodal center as a parking lot next to a railroad track. How would you describe an intermodal center?

A. That's just what it is. It's the rails running through the – the concrete foundations that you put down, the paving that you put down, and then they use a large overhead crane that travels on this concrete. That's the reason why you have to have the great strength in concrete to unload and load on these cars – these freight cars that deliver the intermodal. I think you people have seen the intermodal trains that came come [sic] through Lincoln.

[p. 54] Q. Now –

THE COURT: By intermodal I take it you have reference to the piggyback operation; is that right?

THE WITNESS: That's what it's called. Intermodal in the barrel –

THE COURT: It's – it'd be better, Mr. Judds, and, I know you don't know all of the rules but don't tell the jury that you've seen or address them in that respect. Just respond to the question.

THE WITNESS: I'm nervous

THE COURT: I know you are and I'm not trying to make you more nervous. I'm just trying to avoid us getting into any trouble. You may proceed.

BY MR. DITTRICK:

Q. Mr. Judds, about how long was this intermodal pavement in the Rennick Yards in Colorado?

A. This particular length of concrete was 250-foot wide, and it was about a mile long, and it had underground drainage that we provided, we put in – we did all the grading, the underground drainage, and we laid all the concrete, we mixed the concrete. That's about what we – we did on it.

Q. How many other contractors back in 1986 to your knowledge had experience with a job like that roller-compacted concrete?

A. There were just maybe two or three, maybe four [p. 55] throughout the nation.

Q. Now, after the Rennick Yard was completed, did you bid on another job in Omaha, Nebraska for the Burlington Northern?

A. Yes, we did.

Q. And were you awarded that job?

A. We were awarded the job in Omaha, Nebraska.

Q. And what was that called?

A. That was called the Gibson Yards.

Q. Now, did a problem with the Gibson Yard arise, Mr. Judds?

A. It did.

Q. And do you – Let's see, how do I want to ask this? When the problem arose, did Judds ask for a meeting with the Burlington?

A. Yes. We had given a seminar in Omaha. We didn't – We had to – spent a sizable amount of money that we'd put into advertisement, we had put into traveling around the nation. After we had the success of the Rennick Yards in Denver, Colorado, we were –

Q. Just – You're a little ahead of me, I think.

A. I'm sorry.

Q. Let me go back. After Judds started the – constructing this project in Omaha, the Gibson Yard project, did it then give a seminar with regard to roller-compacted concrete?

[p. 56] A. We did.

Q. And who attended that seminar?

MR. CONFER: Your Honor, at this point I'll object on relevance.

THE COURT: Sustained.

BY MR. DITTRICK:

Q. Following . . . Did the engineers who were providing the supervision and testing at the Gibson Yards project in Omaha attend that seminar?

A. They did.

Q. Now, following that seminar, did those engineers do some further testing at the Gibson Yard?

MR. CONFER: Your Honor, again, I'll object to this line of inquiry on relevance and also Rule 403.

MR. DITTRICK: I'm just looking for a yes or no on this, Judge. I'm not going any further at this time.

THE COURT: Is that – is that the extent of your inquiry –

MR. DITTRICK: Right.

THE COURT: – on this particular line?

MR. DITTRICK: Yes.

THE COURT: I'll permit him to answer.

THE WITNESS: Yes.

BY MR. DITTRICK:

Q. Now, following that testing is that when a problem was [p. 57] discovered?

A. Yes.

Q. And after that problem was discovered, Mr. Judds, did Judds Brothers contact the Burlington Northern to see if they would sit down and discuss this problem?

A. Yes.

Q. And to your knowledge, who attended that meeting on behalf of the Burlington Northern?

MR. CONFER: Again, Your Honor, same objections, relevance, Rule 403.

THE COURT: Overruled. As long as he just identifies the people and nothing further.

THE WITNESS: John Leeper – and I just had the name. I can't think of it now.

BY MR. DITTRICK:

Q. Did Marvin Nelson attend?

A. Marvin Nelson, right.

Q. And they were Burlington Northern representatives?

A. They were engineers.

Q. Was a resolution worked out at that meeting?

A. We were told that –

THE COURT: Well, the question is was a resolution worked out?

THE WITNESS: Yes. There was no resolution, though.

[p. 58] THE COURT: All right. That's the answer.

THE WITNESS: All right.

BY MR. DITTRICK:

Q. Now, following that meeting, did Judds Brothers do any more work at the Gibson Yard?

A. We were thrown off the job at the Gibson Yards.

Q. Did the Burlington do anything else besides throw you off the job?

A. They hired another contractor to finish the job.

Q. Did the Burlington then sue Judds Brothers?

A. They did.

Q. And for how much did they sue Judds Brothers?

A. Sued for $1,000,000.

Q. Mr. Judds, how long did that suit last?

A. That suit lasted two-and-a-half years.

Q. And at some point in time in December of 1989, did you and myself and your son go meet the Burlington in St. Paul, Minnesota?

A. We did in Minneapolis, Minnesota.

Q. And at that meeting did you make a presentation with your lawyers to the Burlington Northern?

A. I did.

Q. And were you discussing at that meeting what you thought were the causes of the problem?

A. I did.

[p. 59] MR. CONFER: Your Honor, I'll object under Rule 408 and Rule 403 and also on relevance.

THE COURT: Well, I'm going to let that answer stand, but I really don't want to have you get in any more detail on that.

MR. DITTRICK: I understand. The answer was yes, I believe, was it, Judge?

THE COURT: Yes.

BY MR. DITTRICK:

Q. Now, was any resolution reached at that meeting in Minneapolis?

A. No.

Q. Following that meeting, Mr. Judds, did Burlington Northern send a letter to your lawyer?

A. They did.

MR. DITTRICK: May I approach, Your Honor?

THE COURT: You may.

BY MR. DITTRICK:

Q. You have Exhibit 81 in front of you, I believe, and, Judge, for the Court's convenience, we have placed copies of I think all of the exhibits that the witnesses will see.

THE COURT: I might say to the members of the jury most of these exhibits – all of the exhibits that are received in evidence that are relevant to the resolution of the issue will be available to you. Some of them you're [p. 60] going to see in blown-up form during the course of the trial, some may be passed among you during the course of the trial if that appears to be a sensible thing to do at the time, but they will all be available in the jury room for you to review as you deliberate and reach a verdict in this case, so you may proceed.

BY MR. DITTRICK:

Q. Mr. Judds, do you have in front of you Exhibit 81?

A. I have Exhibit 81 in front of me.

Q. Now, were you given a copy of that letter, Mr. Judds?

A. Yes.

Q. At – And you were given a copy of that letter, Exhibit 81, on January 16th, I believe, 1990, correct?

A. Yes.

Q. Okay. Now, Mr. Judds, I'm going to ask you to look at the exhibit book to Exhibit 84.

A. (Witness complies.)

Q. Do you see that?

A. Yes.

Q. Now, was that a letter, Mr. Judds, that you also received a copy of around January 11th, 1990?

A. Yes.

Q. And is that a lawyer – Is that a letter from the Burlington's lawyer to your lawyer?

A. A chief counsel to our lawyer.

[p. 61] Q. Is that a yes?

A. Yes.

MR. DITTRICK: I would offer Exhibit 84.

MR. CONFER: No objection.

THE COURT: Wait a minute. I haven't seen it.

MR. DITTRICK: Now –

THE COURT: Wait a minute. Well, your objections, Mr. Confer, to Exhibit 84 – Exhibit 81 has already been received through the pretrial order. That's the settlement agreement for January 16th. What's your objection to Exhibit 84? And I don't want to – an argument. I just want the basis for it.

MR. CONFER: I – My understanding is that you're only offering this January 11, 1980 letter or are you offering the whole –

MR. DITTRICK: Just the first part.

MR. CONFER: Yeah. I don't have any objection to the first page, Your Honor.

THE COURT: Okay. Exhibit – well, okay. Page – page one then of Exhibit 84, a one-page letter, is received.

BY MR. DITTRICK:

Q. Mr. Judds, when you received a copy of this letter, was it your understanding that the Burlington was asking that you meet with Bill Glavin?

A. Yes.

[p. 62] Q. And who is Bill Glavin?

A. Bill Glavin was at that time the chief engineer of the Burlington Northern.

Q. I'm looking at the last paragraph of the letter that says, I propose that Ray Judds and Bill Glavin meet one-on-one with no lawyers or anyone else present. Did you have any problem with that?

A. No.

Q. And did you meet with Bill Glavin one-on-one?

A. Yes.

Q. At the time you met with Bill Glavin, where did you meet?

A. We met in the Burlington Northern 15th floor conference room at Overland Park, Kansas.

Q. At the time you met with Mr. Glavin, did you know whether or not he had a Burlington Northern lawyer there?

A. No.

Q. Did you have a lawyer there?

A. No.

Q. At that meeting with Mr. Glavin, did you discuss the lawsuit?

A. Yes, I did.

Q. Did you discuss the problems that you felt caused the lawsuit to begin?

A. Yes.

[p. 63] Q. Did you ask Mr. Glavin to see if you could resolve your differences?

A. That was our purpose for our meeting.

Q. Now, while you were there, Mr. Judds, did you ask Mr. Glavin if he would guarantee you a forced contract or give you a forced contract?

A. Yes. We had suffered sizably on this lawsuit and – with the costs of legal, cost of engineering and testing,

and we'd also lost a sizable amount of money in the – our office that we had and the salespeople and the travels that we had done, and our concrete business – our roller-compacted concrete business –

MR. CONFER: Your Honor –

THE WITNESS: – just dried –

THE COURT: Just a minute. Just a minute.

MR. CONFER: I'd object. It's a narrative.

THE COURT: Sustained. I think – I'm not sure he's answered the question. I don't know. Would you repeat the question, Rogene. (WHEREUPON, the requested portion of the testimony was read back by the court reporter.)

THE COURT: Okay. That's the answer to the question. You may proceed.

BY MR. DITTRICK:

Q. Mr. Judds, when you were in Minnesota a month before, [p. 64] did you make a statement to the Burlington as to how much money you thought Judds Brothers had lost because of this lawsuit?

MR. CONFER: Objection, Rule 408, irrelevant.

THE COURT: Sustained.

MR. DITTRICK: I need to make an offer of proof, Judge. I think this is –

THE COURT: You may do so. You may do it up here with the court reporter. (Offer of proof at bench.)

MR. DITTRICK: We would submit as an offer of proof that if Mr. Judds were allowed to testify, he would state that at that meeting in December of 1990 – excuse me, 1989, he expressed to the Burlington that in his opinion Judds Brothers has lost 4 or $5,000,000. The reason we feel that – He again brought that up to Mr. Glavin in January off 1990. Judge, the reason we feel that is relevant is because that shows why Mr. Judds was, number one, asking for a forced contract to recover some of that loss or, number two, why he was insistent upon having a continuing contract with the Burlington to continue work so he could recover those losses. I think it's very material.

MR. CONFER: Your Honor, I think he's already – he's already testified that he had a counterclaim for $5,000,000. I don't think that the amount of – of the [p. 65] claim –

THE COURT: There hasn't been any mention of the counterclaim at all. There wasn't any mention of it in the opening statement.

MR. CONFER: I wouldn't think the amount of the – of his damages that he estimated would be relevant. The fact that he indicated that a loss might be relevant, but the amount –

THE COURT: Well, why don't you do this. I mean, it's going to come out the counterclaim filed 'cause that's when it was settled. Just ask him if he filed a counterclaim and for how much, and let's move on to something else.

MR. DITTRICK: Okay.

(End of offer of proof at bench.)

BY MR. DITTRICK:

Q. Mr. Judds, referring back to the lawsuit between the Burlington Northern and Judds Brothers, Judds Brothers filed a counterclaim in that lawsuit?

A. They did.

Q. And as part of that counterclaim, how much was Judds Brothers asking for?

A. $5,000,000.

Q. And when you were meeting then with Mr. Glavin in January of 1990, were you trying to figure out a way to recover those losses?

[p. 66] A. I was.

Q. And did you ask Mr. Glavin if he would give Judds Brothers something called a forced contract?

A. Yes.

Q. And tell us what's a forced contract?

A. A forced contract is a – the figures that a job is going to cost buying the materials and the labors and whatever is needed, the equipment rentals or equipment and adding those all those together with a fixed overhead and a fixed profit, and, generally, it's a very good program. We do quite a little bit of that forced contract work.

Q. Is that a contract that's given out for bids?

A. No, it isn't.

Q. It's just a negotiated contract?

A. That's true.

Q. And when you asked Mr. Glavin to give you some forced contracts to recover some of these lost damages, what was his response?

A. He said, Ray, I cannot do that.

Q. Did you then ask him for some assurance about continuing business?

MR. CONFER: Objection.

BY MR. DITTRICK:

Q. That's a yes or no.

MR. CONFER: Parol evidence rule.

[p. 67] THE WITNESS: Yes.

THE COURT: Wait a minute. I'm going to strike the answer. The objection – An objection has been – I'm going to sustain the objection on the basis that it's a leading question.

BY MR. DITTRICK:

Q. Did you –

THE COURT: Mr. Dittrick.

BY MR. DITTRICK:

Q. Did you have further discussions with Mr. Glavin about work between Burlington and Judds Brothers?

A. Yes.

Q. What'd you discuss?

MR. CONFER: Again, parol evidence rule. I object.

THE COURT: Over – overruled. He may answer.

THE WITNESS: Our desire was to continue.

THE COURT: What was your discussion? You've go to – The question is did you have further discussion with Mr. Glavin –

THE WITNESS: Yes.

THE COURT: – about that? Okay. It's not what your desires are. It's what you said to him and what he said to you, Mr. Judds, please.

THE WITNESS: We wanted to continue being contractors to the Burlington Northern, be reinstated where [p. 68] we once were prior to the Gibson Yard and to do work. We had had success throughout the years and had made real good profits on the Burlington Northern work that we had done, and this is one way that we could recapture our losses, so we'd asked Mr. Glavin to be placed back on their bidders list to do their work for them, and the – Mr. Glavin said, I have no problem with that. He wanted us to continue and be put back where we were before the lawsuit.

BY MR. DITTRICK:

Q. Did you make any statements to Mr. Glavin about bidding on jobs?

A. Yes, I did.

Q. What'd you say and what did he say?

MR. CONFER: May I have a continuing objection on the parol evidence rule?

THE COURT: You may. I would appreciate it, Mr. Judds, if you could not preface your answers with what you intend – what you wanted or so forth. Just state what the conversations were and nothing else if you would, please.

THE WITNESS: Mr. Glavin – May I have the question again, please?

THE COURT: Please reread it.

(WHEREUPON, the requested portion of the testimony was read back by the court reporter.)

THE WITNESS: I said we would be continued [p. 69] contractors for the Burlington Northern and he had no problem with us being the contractors for the Burlington Northern and offering us the work that we'd done in the past.

BY MR. DITTRICK:

Q. Did you make any statements to him about bidding on contracts?

A. Yes.

Q. Okay. What did you mention to him about bidding on contracts?

A. That we would want to bid – we would bid all projects that we could handle, what jobs we could do.

Q. And did you make any statements about being low bidders on contracts, what might happen?

A. Yes.

Q. What did you say?

MR. CONFER: Again, parol evidence rule.

THE COURT: Overruled. He may answer.

THE WITNESS: If we were the low bidder that we would be awarded the job.

BY MR. DITTRICK:

Q. And what was his response?

A. He had no problem with that.

Q. Did you also make a statement to him about whether or not your subcontractors would be paid on the Gibson Yard job?

A. Yes.

[p. 70] Q. And what was said – What did you say to him and what did he say about subcontractors being paid?

A. I asked him to pay the subcontractors on the job and he agreed to pay the subcontractors on the job.

Q. Was there any discussions about paying Judds Brothers for its work on the job?

A. Yes.

Q. And what was said?

A. I asked him to pay Judds Brothers on the job and – and he did indicate that they would pay Judds Brothers on the job.

Q. Do you recall how much the Burlington was going to pay Judds Brothers?

A. $250,000.

Q. Now, Mr. Judds, as part of the agreement, was Judds Brothers going to pay the Burlington any money?

A. No.

Q. Did Mr. Glavin even ask Judds Brothers to pay any money?

A. No.

Q. Was there discussions then, Mr. Judds, of a letter being written to other people?

A. Yes.

Q. And what did you ask him with regard to a letter being written?

A. In our agreement –

[p. 71] THE COURT: Again, just what you said to him.

THE WITNESS: I wanted a letter written by Mr. Glavin showing that we had reached an agreement with the Burlington Northern and in that agreement that we would continue being contractors to the Burlington Northern –

BY MR. DITTRICK:

Q. And –

A. – and being allowed to bid on their jobs.

Q. And what did Mr. Glavin say about that?

A. He had no problem with that.

Q. And, Mr. Judds, looking at Exhibit 85 in front of you – do you have that in front of you, Exhibit 85?

A. (Witness complies.)

Q. Was Exhibit 85 sent to you, Mr. Judds?

A. It was.

MR. DITTRICK: I would offer Exhibit 85, Your Honor.

MR. CONFER: I have no objection.

THE COURT: Well, 85's already been received at the pretrial conference.

BY MR. DITTRICK:

Q. Now, Mr. Judds, looking at Exhibit 85, I want you to – to read for me, if you would, the second sentence of the first paragraph and that begins the lawsuit associated with. Would you read that, please.

[p. 72] A. Yes. The lawsuit associated with the project arose from a misunderstanding of properties and capabilities of roller-compacted concrete specifically in conjunction with the adverse subgrade moisture conditions.

Q. Mr. Confer in his opening statement made reference to the concrete failed because of subgrade being too wet. Do you recall him saying that on opening statement?

A. Yes, I do.

Q. Do you agree with that, Mr. Judds, that the concrete failed at the Gibson Yard project because the subgrade was too wet?

A. Yes, in part.

Q. And when you were having these discussions with the Burlington Northern in December of 1989 when you were presenting your case to them, did you explain to the Burlington then that the subgrade was too wet?

A. I did.

Q. Did you learn, Mr. Judds, that, in fact, the Burlington had waived subgrade specifications regarding moisture at this project?

THE COURT: Just don't answer that question.

MR. CONFER: I'm sorry.

THE COURT: Do you have an objection?

MR. CONFER: Yes, Your Honor. Leading and also Rule 408 and Rule 403.

[p. 73] THE COURT: Sustained.

MR. DITTRICK: Could I be heard at a side bar and make an offer of proof?

THE COURT: You may.

(Offer of proof at side bar.)

MR. DITTRICK: We would offer as an offer of proof that if Mr. Judds were allowed to answer this question, he would say that, yes, the Burlington Northern did waive subgrade moisture specifications at the Gibson

Yard project and also that the Burlington Northern failed to inform Judds Brothers that it was waiving subgrade moisture specifications. It's our belief Mr. Confer brought this up in opening statement. We have every right to go into that right now.

THE COURT: Mr. Confer.

MR. CONFER: Your Honor, this is the subject of the motion in limine which has been filed. I only described the terminology on Exhibit 85 which has been offered by the plaintiff and had been offered in a pretrial conference, didn't do beyond that, and I think that it – the contentions of the parties in the – I think the contentions of the parties in the Gibson Yards lawsuit has been settled by Exhibit 81, and, therefore, it would simply confuse the Jury and take their mind off the issue of the case.

THE COURT: The objection to the offer is [p. 74] sustained.

(End of offer of proof at side bar.)

BY MR. DITTRICK:

Q. Now, Mr. Judds, referring to this sentence that you just read, the lawsuit associated with this project arose from a misunderstanding of properties and capabilities of roller-compacted concrete, specifically in conjunction with adverse subgrade moisture conditions, was that language drafted by you or somebody else?

A. By someone else.

Q. Who wrote this letter, Exhibit 85?

A. I don't know.

Q. Can you tell who signed Exhibit 285 –

A. Yes.

Q. – or, excuse me, 85?

A. Yes.

Q. And who signed it?

A. Bill.

Q. Bill? I need a last name.

A. Glavin.

Q. Okay. And down on the bottom there's a handwritten note there. Can you read that?

A. I can't make it out on here, no.

Q. Okay. I'll just leave it. If you can't make it out, that's fine, Mr. Judds. I wanted to look at the second [p. 75] paragraph of Exhibit 85. And the first sentence in there – in the second paragraph, would you read that, please.

A. Judds Brothers Construction Company continues to be a supplier of construction services to the Burlington Northern Railroad. Judds has also provided tie [sic] rehabilitation services to the Burlington Northern since 1987.

Q. Mr. Judds, when you were reaching your contract. and agreement with the Burlington, was it important to you that Judds Brothers continue to be a supplier of construction services to the Burlington Northern?

A. Yes, yes.

MR. CONFER: Objection, irrelevant. Move that the answer be stricken.

THE COURT: Overruled. I'll let it stand.

BY MR. DITTRICK:

Q. Was that worth more to you than your counter-claim?

MR. CONFER: Same objection.

THE COURT: Overruled. He may answer. Just yes or no.

THE WITNESS: Yes.

BY MR. DITTRICK:

Q. It's yes or –

A. It meant more to me or yes.

Q. Why was it important to Judds Brothers that they continue to be a supplier of construction services to the [p. 76] Burlington Northern?

A. I felt that we could continue and make far more money over a 10- or 15-year period like we had in the past than to shut the door.

Q. Now, in 1986, 1987, Mr. Judds, what type of annual revenues was Judds Brothers getting from the Burlington Northern?

A. 19?

Q. '86, 1987.

A. Between 2 and $5,000,000.

Q. Okay. You wanted to continue that?

A. Yes.

Q. Did you express that desire to Mr. Glavin when you met with him on January 16th?

A. Yes.

Q. Did Mr. Glavin make any representations to you that Judds Brothers would continue to be a supplier of services?

MR. CONFER: Objection, parol evidence.

THE COURT: Overruled. He may answer.

THE WITNESS: He had no problem.

BY MR. DITTRICK:

Q. And based upon Mr. Glavin stating to you that he had no problem, did you agree to dismiss the lawsuit?

A. Yes.

Q. And did you dismiss your lawsuit?

[p. 77] A. Yes.

Q. And did the Burlington dismiss –

THE COURT: All of that – Of course, now we're really getting beyond – I mean, the lawsuit has been settled, and whether it was dismissed or not dismissed I think is irrelevant to the issues now. I mean, I understand the need for the – setting the stage as it were for that agreement, but I don't think that the res – the actions with respect to the dismissing the lawsuit are relevant, Mr. Dittrick.

MR. DITTRICK: I was trying to show we did what we were supposed to do, Judge.

THE COURT: Well, there isn't any dispute that you didn't. Nobody has claimed that that settlement agreement as it was written there – that the parties haven't done what they've done except with respect to whether or not the letter written pursuant to paragraph d has expanded the obligation of the railroad.

MR. DITTRICK: You're right, Judge.

BY MR. DITTRICK:

Q. Mr. Judds, looking then to Exhibit 81 again, you have that in front of you?

A. Yes.

MR. DITTRICK: I believe that's already in evidence, Judge?

[p. 78] THE COURT: Yes.

BY MR. DITTRICK:

Q. And looking at paragraph d of Exhibit 81, this letter, Mr. Judds, was it given to you on January 16, 1990?

A. Yes.

Q. Did you type it up?

A. No.

Q. Who typed it up?

A. I don't know.

Q. Did Bill Glavin give you this letter?

A. He did.

Q. Did Mr. Glavin tell you he was having any lawyers look at this letter?

A. He didn't.

Q. Were you asked to contact your lawyer before you signed it?

A. No.

Q. You agreed to sign this letter?

A. In good faith, yes.

Q. Now, would you read paragraph number d, please, into the record.

A. D?

Q. Yes.

A. I will write you a letter indicating that the litigation here resulted from a misunderstanding between the parties and [p. 79] that the controversy has been resolved to the mutual satisfaction of the Burlington Northern and Judds Brothers.

Q. And was such a letter written?

A. Yes.

Q. And that was Exhibit 85 we've seen before?

A. Yes.

Q. Now, after Exhibit 85 was written, Mr. Judds, did Judds Brothers get some contracts from the Burlington Northern in the year 1990?

A. I don't believe so or it might have just been a small amount from the Havelock shops.

Q. You mention the Havelock shops and what – what's the Havelock shops?

A. That's a Burlington Northern entity or – where they repair cars and – and a wheel plant, and we were doing work there for many, many years.

Q. Mr. Judds, in 1992 did Judds continue some negotiation on what's been referred to in opening statement as a Gantry crane job?

A. Yes.

Q. And would you tell us what this Gantry crane job was all about?

A. It was a Gantry crane that had – was a crane that was in operation, and it had some difficulties and needed to be repaired and replaced, some of the parts, and we worked [p. 80] through a design program with the Burlington Northern and estimates in 1992, and I think in 1993 they awarded us the job.

Q. Now, do you have a recollection about how large a job this Gantry crane was?

A. This was $900,000.

Q. And was Judds Brothers given that job?

A. Yes.

Q. Now, in the spring of 1993, Mr. Judds, did the Burlington make some claim against Judds Brothers?

A. Yes.

Q. What claim did they make?

A. It was a Buddy Stanley claim in Illinois. They had an injury and they thought that we were responsible for his injury.

Q. And did the Burlington want Judds Brothers to pay some money?

A. Yes.

Q. Did they contact you?

A. They did.

Q. And how much money did they ask Judds Brothers for?

A. $250,000.

Q. And what was Judds Brothers' response?

A. We were not obligated to pay that. It was not our problem.

[p. 81] Q. And after you made that statement, to you [sic] knowledge, did the Judds Brothers become informed that the Burlington Northern went ahead and paid Buddy Stanley?

A. Yes.

Q. And how much did they pay him?

A. $250,000.

Q. Did the Burlington then sue Judds Brothers?

A. They did.

Q. Where did they sue them?

A. In Denver. Well, they sued us in Illinois.

Q. And that was again in the spring of 1993?

A. Yes.

Q. Now, I want to refer to May of 1993. In May of 1993, did you have to go down to Texas to get the Gantry crane contract signed?

A. Yes.

Q. Why?

A. The Denver office sent us a contract to have taken – deliver to Fort Worth to have it signed that very day – well, the day after we got the contract, but to have it signed – it was – it had to be signed that following day. For what reasons I don't know, but, anyway, I was – I boarded a plane, went to Fort Worth to meet with one of the vice presidents that was assigned to sign this contract, and he was not in, so I called our office back in Lincoln, and [p. 82] they called the Denver office, and the Denver office instructed that – John Leeper, one of the vice presidents of the Burlington Northern, to sign this contract.

Q. Did you then try to get ahold of Mr. Leeper?

A. Yes, I did. I had direction to his office and I went in to see him.

Q. What did he say to you?

A. What the hell are you doing here?

Q. What was your response?

A. I was shocked. I had never been treated that way in an engineering office.

Q. And what did you say?

A. I told him that he was to sign this contract on this Gantry crane April, I needed it signed today, and he

didn't believe me, and so he called to the Denver office, and they gave him authority to sign it. He was told to sign it.

Q. Did he then sign it in front of you?

A. I can't say he signed it in front of me. He was – He didn't want to sign it. He said that this wasn't his job.

Q. Did he make any other comment to you about the contract that you can recall?

A. I can't recall right now.

Q. He told you this wasn't his contract?

A. Yes.

Q. Do you have any idea why he said that to you?

[p. 83] MR. CONFER: Objection, lack of knowledge, lack of foundation.

MR. DITTRICK: Withdraw the question.

THE COURT: All right.

MR. DITTRICK: You're right.

BY MR. DITTRICK:

Q. Did he make any other statements to you, Mr. Judds?

MR. CONFER: Again, I'll object for lack of knowledge. The witness has already said he doesn't recall anything else –

THE COURT: Sustained.

BY MR. DITTRICK:

Q. Mr. Judds, I want to go back in time with you a little bit back to 1991. Back in 1991 did you have any experience with the Burlington Northern not renewing contracts with you back in 1991 on some jobs that you can recall?

A. There was a tie job that we were doing in Denver, Colorado. We were rehabbing ties.

Q. Okay. Now, tell – tell the ladies and gentlemen when – when did this contract begin, approximately?

A. In 1985, I believe. '87 or – '87.

Q. Okay. And – and what type of a contract? What was – what was Judds doing for the railroad?

A. We were unloading the wood ties that they picked up out on their right-of-ways, and we were taking the ties, pulling [p. 84] the spikes and the plates, separating them, grading the ties, the ones to be reused by the Burlington Northern and the ones that were to become scrap ties. We would add to the ties so they had equal – equal depth on the – where the plates sit. We would treat the ties and bundle them – grade them and bundle them and then load them on the Burlington Northern cars, so they could be returned to the Burlington Northern.

Q. And when these ties were returned to the Burlington Northern, what happened to them?

A. They were used out on their system.

Q. Was Buddy Stanley injured while he was working with these ties out in Illinois?

A. Yes.

Q. Now, Mr. Judds, tell us about the fire that happened in the summer of 1991 out in Colorado.

A. We had – in late evening we had a fire at our plant in Denver, Colorado, and it destroyed our spike pulling, it destroyed our treatment, it just destroyed about everything. It was a sizable fire.

Q. Knowing that Mr. Glavin had written a letter saying Judds continues to be a supplier including the tie plant, did you then go to the Burlington people to see if they would renew that contract?

A. Yes.

Q. Was it going to be expensive for you to rebuild that [p. 85] plant?

A. Yes.

Q. How expensive?

A. The first estimates was $350,000, but it was in excess of that.

Q. Did you know whether or not you would encounter zoning or licensing problems there also?

A. We were working on a temporary permit in Adams County, Denver, and they would not renew or permit without us installing the permanent buildings, permanent sewer, all these items that they were going to require.

Q. Did you then go to the Burlington to talk about renewing the contract?

A. I did.

Q. Who was there at that meeting?

A. John Bosshart.

Q. Was your son there?

A. Yes.

Q. What happened?

MR. CONFER: I'll object on relevance.

THE COURT: Well, I'm – I'm going to receive it conditionally. I perceive this is foundational in character, and for that purpose only, I'll receive it.

BY MR. DITTRICK:

Q. You may answer. What happened at that meeting where you [p. 86] discussed renewing the contract?

A. He refused to –

THE COURT: Again, Mr. Judds, I'm going to ask you to stay away from your mental impressions and so forth but just go to what actually occurred or what was actually said if you would, please.

THE WITNESS: I'm having a difficult time, Your Honor.

THE COURT: I know, but I still have to require you to proceed that way.

BY MR. DITTRICK:

Q. What did Mr. Bosshart say about renewing the contract?

A. He said no.

Q. So what did Judds Brothers do then?

A. We had a clause in our – the Burlington Northern agreement that we could terminate that contract and we exercised that. Within 60 days, we had to terminate that.

Q. And did you then just – Well, how long after that then did you continue to provide some type of service of ties for Burlington?

A. We – we had another agreement that we established with Mr. Bosshart and Burlington Northern to bundle the – to pull. the spikes and to – the plates and grade the ties, put a single band around them, load them on their gondola cars, and we were paid a lot less money for that project. We finished [p. 87] up our – our year and three months or four months that we needed to finish the contract.

Q. Was that – Was the tie contract then ever renewed?

A. Never renewed.

Q. Mr. Confer in opening statement made some references to Judds' marketing activities, and I want to review those with you for a while now, Mr. Judds. I want you to tell the ladies and gentlemen of the jury, please, what type of marketing activity Judds Brothers was doing with regard to roller-compacted concrete back in 1986 and 1987 with the Burlington. Would you tell us that, please.

A. We – we devised a brochure, and we had had permission from the Burlington Northern to be a partner

with them on the – the roller-compacted concrete entity that we had developed, and we had hired salesmen in Denver, Colorado, we had opened up an office there. We had one estimator traveling the country and our salesman was traveling the country besides myself. We were going to intermodal meetings, setting up booths, we were giving bids to various entities, the government agencies, railroads, cities, municipalities, the states. We spent a sizable amount of money because we had just completed the largest intermodal roller-compacted concrete program in North America.

Q. Did – Was the Burlington discussing with you back then in 1986, 1987 constructing other intermodal facilities for [p. 88] the railroad at other locations?

A. Yes. We were – we had the one in Omaha, we were going to do one in – in Chicago, Naperville, one in – in Memphis, Tennessee. I visited Kansas City, Minneapolis, St. Paul. We were going to use the intermodal – They were putting in new intermodals in those locations and one in Tulsa. That was our program that we were going to put those in.

Q. You mentioned brochures. With the Burlington's permission, did you have brochures printed up?

A. Yes. Yes, we did.

Q. Did you distribute those brochures to the railroad?

A. Yes.

Q. Did you distribute those brochures to other governmental agencies?

A. Yes.

Q. To whom?

A. The Bureau of Reclamations, Corps of Engineers, Department of the Air Force, Department of the Army, Naval, states, cities, rapid advancement deployment in New York and different places like that, even docks.

Q. When the problem arose at the Gibson Yard in Omaha, Nebraska, what happened to all your roller-compacted concrete work that you were negotiating?

A. It died.

Q. What'd you do with your paver that Judds Brothers [p. 89] bought – this half million dollar paver that Judds Brothers bought?

A. It rusted.

Q. Mr. Judds, Mr. Confer made reference to the fact that Judds did no other marketing activities. After Judds bid on the Grand Island project and the Lincoln freight pit project, did you try to set up a meeting with anybody from the Burlington to talk about Judds Brothers' work?

A. Yes.

Q. Who?

A. Mr. Glavin.

Q. What'd you do – What'd you say to Mr. Glavin?

A. I called Mr. Glavin.

Q. What'd you say to him?

A. I wanted him to look into the reasons why we were not awarded the Grand Island project and/or – and at a different time, of course, and/or the freight pit.

Q. Did Mr. Glavin ever get back to you and explain anything to you?

A. Mr. Glavin said he would look into it.

Q. Did he ever get back to you after that?

A. No.

Q. Did you ever try to set up a meeting with Trent Hudak down in Texas to discuss Burlington's business with Judds Brothers?

[p. 90] A. Yes.

Q. Tell us about that meeting.

A. I called Mr. Hudak, and I received his answering machine in Fort Worth, and I told him that I was going to be down the following morning to visit with him about the – the award of the contract, and so I flew down to Fort Worth, and I went on the second floor of the – of the office building of the Burlington Northern, and they – they generally call up to engineering to get the – the approval to go up and see them, and he said he was too busy, that he would get back with me, and I waited about three-fourths of an hour, and, finally, a call came down, said he couldn't meet with me.

Q. Had you set up that meeting with him before?

A. Just by telephone.

Q. Did anybody tell you before you went down there that nobody was going to meet with you?

A. No.

Q. When the Burlington sued Judds Brothers back in 1987 with regard to the Gibson Yard project, did that have an effect on the ability of Judds to get any bonding or insurance work for any of its other bonded work?

A. The bonds dried up. The banking dried up and it looked terrible.

Q. Now, what types of jobs does Judds do that needs bonding work?

[p. 91] A. We do work in municipalities, underground utilities. We do work for large firms like the Archer Daniels, the – the Ralston Purinas, the states building bridges, Burlington, other jobs that we need bonds on.

Q. And did you lose all that business from 1987 through 1990?

A. We were not able to bid on those jobs.

Q. Was that part of the basis for your $5,000,000 counterclaim?

A. Yes.

Q. Mr. Judds, after your settlement agreement or your contract agreement with Mr. Glavin back in 1990, did the Burlington ever invite you to any retirement-type parties or anything to be present with Burlington Northern people?

A. Yes.

Q. Tell us about that.

A. I was in Houston, Texas. My son Mark had cancer, was taking treatments, and I went to a – flew up – on it was in February I think in 1988. There was a – a good friend of mine who's a vice president of the Burlington Northern also in engineering that had a retirement party and had invited me, and Mr. Glavin was there.

MR. CONFER: May I object at this point to the narrative form of the testimony. The question was after 1990 and the answer is – relates to 1988.

[p. 92] THE COURT: That is true. You asked after 1990 what date – whether he went to a retirement party and he said yes, and I don't know that we're talking about that.

BY MR. DITTRICK:

Q. Was it after 1990 Mr. Glavin –

A. No.

Q. Okay. After 1990 were you ever invited to any retirement parties or anything by the Burlington?

A. No.

Q. Prior to 1990 had you been invited to retirement parties by the Burlington Northern?

A. Prior?

Q. No, excuse me, before – before 1990.

A. Yes.

Q. Okay. Tell us about that.

A. Numerous ones that I was invited to and – but they didn't – the one that I was speaking of was – Bill Glavin was there.

MR. CONFER: Again, this is narrative testimony, I believe. The answer has been given.

THE COURT: Yeah, it is narrative. I don't perceive that it's relevant, though, Mr. Dittrick, whether he was invited to retirement parties.

MR. DITTRICK: I'm trying to show the – the actions of the Burlington before the agreement and then [p. 93] contrasted with the actions after the agreement, and I think that does go to relevance, Judge. I don't want to –

THE COURT: You and I may not – I'm going to let you go ahead, but I – I want to keep it very brief, because I think we're getting a little far afield, frankly.

BY MR. DITTRICK:

Q. Were you invited to various retirement parties of the Burlington Northern officials before 1990?

A. Yes.

Q. You were making the reference to one in 1988. Did you talk with Mr. Glavin at that party? And I'm just looking for a yes or no answer.

A. Yes.

Q. What type of a relationship did you have with Mr. Glavin?

A. I held his newborn baby that evening. His wife was at the retirement party. And that was just the type of trust that Mr. Glavin and I had.

Q. Did you trust him?

A. I trusted him. He trusted me.

Q. Now, after your meeting in January 16th of 1990, Mr. Judds, did you ever get invited to any more parties like that?

A. No.

Q. Did you try to call various Burlington Northern people [p. 94] to see if you could get audiences with them or talk to them about things?

A. Yes.

Q. Were you ever successful?

A. No.

Q. Mr. Judds, after the Burlington Northern sued Judds Brothers in the spring of 1993 in Illinois, you remember that?

A. Yes.

Q. Did they then sue Judds Brothers someplace else regarding the same matter?

A. Yes.

Q. Where did they sue Judds Brothers then?

A. Denver, Colorado.

Q. Do you remember what year that was?

A. No.

Q. That suit where the Judds Brothers – excuse me, where the Burlington sued Judds Brothers, that's really what started the action we're here in today?

A. Yes.

Q. Mr. Judds, so far this year in 1998, how many construction projects has the Burlington invited Judds to bid on?

A. In 1998?

Q. This year.

[p. 95] A. None.

Q. In 1997 how many construction jobs did the Burlington Northern invite Judds to bid on that you know of?

A. I think one.

Q. Do you know that for certain in 1997?

A. I'm not certain.

Q. Okay. In 1997, Mr. Judds, has Judds Brothers done any work at the Havelock shops for Burlington Northern to your knowledge?

A. No.

Q. In the past, has Judds Brothers done a substantial amount of work for the Burlington Northern at the Havelock shops?

A. In the past they had.

Q. Was that bid-type jobs or just call up Judds and say, we need you to do something?

A. A good share of it was negotiated on the job.

Q. Mr. Judds, with regard to Exhibit 85, to your knowledge did Mr. Glavin send this exhibit to any Burlington Northern employees, do you know?

A. I don't know.

Q. Have you had any Burlington Northern employees ever tell you that Mr. Glavin sent you that letter?

A. No.

Q. Mr. Judds, in the past have you – and this is a yes or [p. 96] no question, have you had any personal experience with the Burlington Northern blackballing anyone?

A. Yes.

Q. Have you ever tried to intercede for some construction company with the Burlington when the Burlington Northern blackballed someone?

MR. CONFER: I'll object under Rule 403.

THE COURT: Sustained.

MR. DITTRICK: I need to make an offer of proof.

THE COURT: You may.

MR. CONFER: I move that the answer be stricken, also, Your Honor.

THE COURT: If there was an answer, the answer will be stricken. You may make an offer of proof.

(Offer of proof at side bar.)

MR. DITTRICK: If Mr. Judds were allowed to testify – if Mr. Judds were allowed to testify, he would testify that the Burlington Northern has blackballed construction companies in the past, that he has been directly involved and tried to negotiate with companies who were blackballed by the Burlington trying to get them back into the good graces of the Burlington, so we know for a fact that the Burlington Northern does blackball companies from doing construction work for them.

THE COURT: Is your objection the same?

[p. 97] MR. CONFER: Yes, Your Honor.

THE COURT: The objection is sustained.

MR. DITTRICK: What was the basis for the objection?

MR. CONFER: Rule 403 and irrelevant.

THE COURT: And it's sustained primarily on the grounds that it's irrelevant.

MR. CONFER: Your Honor, may the jury be instructed to disregard the answer?

THE COURT: I don't believe there was an answer, but I've stricken the answer. If there was an answer, the jury is instructed to disregard it.

MR. DITTRICK: Could I be heard at the break over this, Judge?

THE COURT: You may.

MR. CONFER: I'm sorry, I didn't hear.

THE COURT: He wants to be heard at the break over this. The break won't be until 4:30.

(End of offer of proof at side bar.)

BY MR. DITTRICK:

Q. Mr. Judds, does Judds Brothers today continue to be a supplier of services for the Burlington Northern?

A. Yes.

Q. And how – how do you know that?

A. We're just finishing up a job at the refueling here at [p. 98] the west end of Lincoln here.

Q. And when did Judds Brothers bid that job?

A. I can't give you the time on that.

Q. Okay. Was it over a year ago?

A. Yes.

Q. Other than that job, does Judds Brothers continue to be a supplier of services to the Burlington Northern?

A. No.

Q. Is there anything in the pipeline that Judds Brothers is negotiating with the Burlington Northern at all?

A. None.

Q. Has the Burlington Northern sent to Judds Brothers in the last ten months any construction projects to bid on?

A. I don't believe so.

MR. DITTRICK: I think I'm done, Judge. Just give me a moment to check.

THE COURT: All right.

BY MR. DITTRICK:

Q. Mr. Judds, with – with regard to that roller-compacted concrete that Judds Brothers laid at the Rennick yard, is the Burlington still using that concrete?

A. They are.

Q. It's still intact to your knowledge?

A. Yes.

Q. When Judds Brothers bid on the Gibson Yard project in [p. 99] Omaha, did Judds Brothers ask the Burlington Northern to use the same engineers that they had used at Rennick?

MR. CONFER: Objection, irrelevant.

THE COURT: Overruled. I'll let him answer it.

THE WITNESS: Yes.

BY MR. DITTRICK:

Q. And what was the Burlington Northern's response?

A. They had their own engineering testing people and they were going to use HWS.

MR. DITTRICK: I have no further questions, Your Honor.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. CONFER:

Q. Mr. Judds, you testified that you met with Mr. Glavin at Overland Park on January 16th of 1990; is that correct?

A. Yes.

Q. And this agreement – May I approach, Your Honor?

THE COURT: You may.

BY MR. CONFER:

Q. Exhibit No. 81 was given to you on that date; is that correct?

A. Yes.

Q. All right. And this exhibit, Exhibit 85, was received by you maybe a week or more later; is that correct?

[p. 100] A. Sometime shortly after, yes.

Q. You received this in the mail?

A. Yes.

Q. Did you ever talk with Mr. Glavin other than on January 16th of 1990 about what that letter, Exhibit No. 85, was going to say?

A. We talked about it during the January 16th time.

Q. And that was the only time that you ever talked to Mr. Glavin about the settlement; isn't that true?

A. That was our settlement agreement.

Q. That was the only day that you ever talked to Mr. Glavin about settlement, correct?

A. Yes.

Q. You didn't have any conversations with him after January 16th of 1990, correct?

A. Yes.

Q. All right. And Exhibit 81 was the agreement or the letter that set forth the agreement between you and Mr. Glavin; is that correct?

A. It was in part of the agreement.

Q. Do you recall that when your deposition was taken you testified that that was the agreement, it did set forth the agreement?

A. It – it was – it was part of the discussion of the agreement.

[p. 101] Q. Well, that – at the time you got Exhibit 16 (sic), you looked at it and said, that's everything we talked about, correct?

MR. DITTRICK: Object to the form of the question.

THE WITNESS: No.

THE COURT: Overruled.

MR. CONFER: May I approach, Your Honor?

THE COURT: You may.

BY MR. CONFER:

Q. I'm handing you, Mr. Judds, your deposition –

A. Yes.

Q. – which was taken on January 26th of 1998, correct?

A. Yes.

Q. And on January 26th of 1998, you appeared at my law offices to give a deposition in this case; is that correct?

A. Yes.

Q. And Mr. Dittrick, your attorney, was present; is that correct?

A. Yes.

Q. And you were placed under oath at that time?

A. Yes.

Q. And you swore to tell the truth?

A. Yes.

Q. Now, in your deposition, do you recall stating that Exhibit – Deposition Exhibit 15 set forth the agreement [p. 102] between you and Mr. Glavin?

MR. DITTRICK: Could I have page and number here we're talking about, Judge?

THE COURT: Yes.

BY MR. CONFER:

Q. On page 79 of that – of that deposition, would you turn to that page, please.

A. (Witness complies.)

Q. And I guess I have to correct myself. Do you recall on Line 6 of page 79 I asked you this question, "My question to you is do you recall seeing Exhibit No. 81 on January 16 of 1990," and you answered, "Yes, I do." And I asked you, "Did Exhibit 81 set forth the agreement between you and Mr. Glavin to the best of your knowledge and recollection," and you answered, "Yes, it did," and I asked you, "Was there anything else that you and Mr. Glavin discussed that does not agree to – that does not appear in Exhibit 81?"

THE COURT: Would you read that question again.

MR. CONFER: Yes, Your Honor. I was – As I frequently do, I stumbled when I asked the question in the deposition. That's why I stumbled when I read it.

BY MR. CONFER:

Q. I asked you, "Was there anything else that you and Mr. Glavin discussed that does not" and then I stopped and said "agreed to that does not appear in Exhibit 81;" is that [p. 103] correct?

A. That's what it says here.

Q. And you answered, "I think it represents what we had talked about;" is that correct?

A. Yes.

Q. So at that time you testified that Exhibit No. 81 which is on the podium there next to you was the agreement between you and Mr. Glavin; is that correct?

A. Yes.

Q. And you testified – When I asked you if there was anything else that you agreed to that wasn't in that, you said that's the – that's what we talked about, correct?

A. That's what I said, yes.

Q. And did you also testify – or let me back up. That was the only time that – That January 16th, 1990 meeting was the only time that the settlement terms were worked out; is that correct?

A. Yes.

Q. And – and under paragraph e of that agreement, it states representatives of both parties will keep the settlement terms strictly confidential; is that correct?

A. Yes.

Q. And you never showed Exhibit No. 81 to anyone, did you, until this lawsuit was brought?

A. Just to our immediate people in our office –

[p. 104] Q. Okay.

A. – and our attorney.

Q. All right. When you came back from Overland Park or after you met with Mr. Glavin and you went to

Judds Brothers, Mr. Steele and John Judds, and you showed them this Exhibit No. 81; is that correct?

A. Yes.

Q. And you said this is our settlement agreement; is that correct?

MR. DITTRICK: Can I have that question read back, please?

THE COURT: You may read the question back.

(WHEREUPON, the requested portion of the testimony was read back by the court reporter.)

MR. DITTRICK: Can I have the question before that, please?

(WHEREUPON, the requested portion of the testimony was read back by the court reporter.)

THE COURT: You may answer the question.

THE WITNESS: Yes.

BY MR. CONFER:

Q. Now, you had also asked Mr. Glavin for a letter that you could show your bonding company and your banker; is that correct?

A. Yes.

[p. 105] Q. Because you were having trouble getting bonding and you were having trouble getting financing to run your business; is that accurate?

A. Yes.

Q. So in paragraph d, Mr. Glavin agreed that he would write you a letter that you could show to people to get bonding and to get banking services; is that correct?

A. Yes.

Q. And Exhibit No. 85 – May I approach, Your Honor?

THE COURT: You may.

BY MR. CONFER:

Q. This letter that you got on January 22nd, 1990 in the mail was the letter that he wrote for you to show to bankers and the bonding company, correct?

A. Yes.

Q. That is the letter that was referred to in paragraph d of Exhibit 81?

A. Yes.

Q. And you did show Exhibit No. 85 to your banker; is that correct?

A. Yes.

Q. And you showed it to suppliers, your subcontractors; is that right?

A. Yes.

Q. And either you or somebody from Judds Brothers also [p. 106] showed it to your bonding company, correct?

A. Yes.

Q. And you didn't feel that that was a violation of this confidentiality clause in paragraph e, did you?

A. It was a part of the agreement.

Q. Part of the agreement was that you would be allowed to show this to people?

A. Yes, and that's why it was kept away from this other agreement.

Q. Right. Subparagraph e says representatives of both parties will keep the settlement terms strictly confidential, correct?

A. Yes.

Q. And that only referred to Exhibit 81; is that your testimony?

A. That was in part the – the agreement that we had, yes.

Q. All right.

A. This letter was to show our subcontractors, our bankers, our bonding but not to reveal the – the substance of the settlement.

Q. All right. Now, you had also asked Mr. Glavin if you could have a guarantee of work; is that correct?

A. That was our agreement.

Q. Didn't Mr. Glavin tell you that he could not guarantee you work?

[p. 107] A. We would continue being contractors for the Burlington Northern. That was our agreement, that

we – we could continue being the contractor that Burlington – be put back where we were when we first – before the lawsuit came about.

Q. Well, didn't you ask Mr. Glavin if he would guarantee you work so you could earn money back, and he said, no, I can't do that?

A. By forced contract only.

Q. Well, didn't he tell you, I can't treat you any differently than anybody else?

A. He meant on a forced contract is what he was speaking of.

Q. Do you recall telling me that Mr. Glavin said, I can't treat you any differently than anybody else?

A. That was in regard to when I'd asked for a time and material contract.

Q. When you say that Mr. Glavin had no problem with telling you that if you were the low bidder, you would get the work, he didn't tell you that if you were the low bidder, you would get the work, did he?

A. That was an implied situation that we had experienced with the Burlington Northern from the onset of my business with the Burlington Northern. If we were the low bidder, we were awarded the contract.

Q. Okay. When you say it was implied, then you're saying [p. 108] Mr. Glavin didn't say that but that was – that was something that you implied?

A. He – no. We – You were not there. Just myself and Mr. Glavin was there, and in his deposition he even tells us –

Q. Well, I'd like to interrupt you.

A. All right.

MR. CONFER: Move that the answer be stricken because it's not responsive to the question.

THE COURT: Sustained.

BY MR. CONFER:

Q. Mr. Glavin did not tell you that if you were the low bidder, you would get the work, did he?

A. Yes. As we had in the past, yes.

Q. Didn't he – Do you recall me asking you in your deposition if he told you that. You said that he had not?

A. Whereabouts did I say that?

Q. Let's look at page 69 of your deposition, Mr. Judds. And, again, this is the deposition that you gave in my office on January 26th, correct?

A. Yes.

Q. All right. And on page 69, I said what did Mr. –

THE COURT: What line number are you referring to?

MR. CONFER: I'm sorry, Your Honor, Line 2, Page 69.

[p. 109] BY MR. CONFER:

Q. I said, "What did Mr. – can you tell me the words that you recall Mr. Glavin stating when you said that you – if you were the low bidder, you wanted to be awarded the job," and your answer was, "I think that was an understanding. That if we bid the job and we were the low bidder, then we would do the work." And I'd asked you, "Okay. When you say you think that was an understanding, why did you think that was an understanding?" And your answer was, "In our conversation, I think it developed around that, and I can't give you the exact words that came from him or it came from me, but these are implied between railroad contractor and railroad chief engineer that you have that ability. You have the low responsible bidder, then that job is awarded to you, and we look to that on any and every job we do." And I asked you, "When you say that was implied, did he say anything to you that made you believe that was his understanding," and you answered, "No". Correct?

A. It appears that I've answered no, yes.

Q. So he did not tell you anything that made you believe that was his understanding; is that correct?

A. If – if in that light that you say that, yes.

Q. And in Exhibit No. 85, the statement that Judds Brothers continues to be a supplier of construction services to Burlington Northern, that was true on January 22nd of 1990; [p. 110] is that correct?

A. Yes.

Q. You were supplying construction services to Burlington Northern at that time?

A. Yes.

Q. And you were also supplying tie rehabilitation services to Burlington Northern at that time; is that correct?

A. Yes.

MR. CONFER: May I have just a moment, Your Honor?

THE COURT: You may.

MR. CONFER: I thought I had some copies. Does the court have copies of Burlington Northern's exhibits?

THE COURT: I have copies of 200 series which I believe are the ones applicable.

MR. CONFER: All right. Thank you. May I approach?

THE COURT: You may.

MR. CONFER: May I borrow a stapler?

MR. DITTRICK: Rod, he has them.

BY MR. CONFER:

Q. I'm sorry. Would you turn to Exhibit 213 in the book in front of you, Mr. Judds. I didn't realize that you had –

THE COURT: That is not in my book, 213.

MR. CONFER: Oh.

THE WITNESS: It is not in my book either.

[p. 111] MR. CONFER: Do you have Exhibit 213?

MR. DITTRICK: One page?

MR. CONFER: 213.

MR. DITTRICK: Yeah, one page.

MR. CONFER: Yes.

BY MR. CONFER:

Q. I think we're about there, Mr. Judds. Can you identify Exhibit 213?

A. Yes.

Q. What is Exhibit 213?

A. It's a letter to Mr. John Bosshart dated August 19th, 1991.

Q. And was this letter written by you to Mr. Bosshart?

A. Yes.

MR. CONFER: I'd offer Exhibit 213.

MR. DITTRICK: No objection.

THE COURT: Exhibit 2 – What is exhibit – Exhibit 213 is already in evidence. And the other copies you've given me, 211 and 212, those have also been received in evidence at the pretrial conference.

MR. CONFER: Thank you, Your Honor.

BY MR. CONFER:

Q. Exhibit 213 was a letter that you wrote to Mr. Bosshart to cancel the tie rehabilitation contract, is that correct, after your fire?

[p. 112] A. I'm not sure if this is a – yes, it is a termination, yes.

Q. And Exhibit 212 is the next letter that you wrote to him, and, again, you're saying we're insisting on cancelling our tie rehabilitation contract; is that correct?

A. Yes.

Q. Burlington Northern did not want you to cancel that rehabilitation contract, did they?

A. No.

Q. And Judds Brothers –

THE COURT: Well, just a minute. I want to be sure I understand the answer because it's a negative to a negative.

MR. CONFER: All right.

THE COURT: By that do you mean that that statement is correct, that Burlington Northern did not want you to terminate the contract?

THE WITNESS: The original contract is what I'm speaking of.

THE COURT: Yeah. And these – the contract these letters refer to, I take it; is that right?

THE WITNESS: The second letter refers to one too, Your Honor.

THE COURT: Refers to the original contract?

THE WITNESS: Refers to the original contract.

[p. 113] BY MR. CONFER:

Q. And at the time you had the fire, you still had approximately a year remaining on that contract; is that correct?

A. Yes.

Q. And Burlington Northern wanted you to continue to perform that contract; is that correct?

A. Yes.

Q. And in Exhibit 213, 212 and 211, you were saying we are not going to continue performing that contract; is that correct?

A. Yes.

Q. And as the reasons for that, you state that you do not want to rebuild your plant, you don't want to obtain these permits that the city wanted you to obtain; is that correct?

A. It was – Time element was one thing that we weren't assured of. We could not build the plant for the – the extent of the original contract, only the year left on – on the contract, and we had to terminate this within 60 days of the fire and that was our reason for that.

Q. And you insisted on terminating it, correct?

A. Yes, we did.

Q. And Exhibit 211 is the final letter that you wrote to Mr. Bosshart again insisting that you would cancel that contract, correct?

[p. 114] A. Yes, within the guidelines of the contract that we had.

Q. Your letter, Exhibit 211, states this letter is to reiterate our termination of our contract dated April 7th, 1987 pursuant to our letters of September 12th, 1991 and September 23, 1991, correct?

A. Yes.

Q. So Judds Brothers was the party that terminated the tie rehabilitation contract?

A. We terminated the contract as to the – the terms of the contract.

Q. Now, did Judds Brothers believe that Exhibit No. 85 kept them from terminating that tie rehabilitation contract?

A. I don't understand that question.

MR. CONFER: May I approach, Your Honor?

THE COURT: You may.

BY MR. CONFER:

Q. In Exhibit No. 85, it states, Judds has also provided tie rehabilitation service to the Burlington Northern since 1987; is that correct?

A. Yes.

Q. Did that mean to you that you had to continue to provide tie rehabilitation service to Burlington Northern Railroad in the future?

A. No.

Q. You believed that you could cancel the tie [p. 115] rehabilitation contract pursuant to the terms of that agreement, correct?

A. That agreement was drawn up by the Burlington Northern and it gave us the position to terminate the contract.

Q. And by Exhibit No. 85 you weren't promising that you were going to perform that tie rehabilitation contract in the future, were you, other than by the terms of the original agreement?

A. I don't understand what your – what your question is.

Q. Well, you didn't think that Exhibit No. 85 terminated – modified your tie rehabilitation contract so that you had to continue in the future to provide BN tie rehabilitation services, did you?

A. I can't get, you know, what the question is yet. I want to be hesitant on answering it.

Q. Exhibit No. 85, you didn't believe that modified your tie rehabilitation contract –

A. No.

Q. – with the Burlington Northern? And if your 1987 contract for tie rehabilitation allowed you to cancel, you thought you could do that, correct?

A. Yes. It was within the guidelines of the contract.

Q. And that's what you did, correct?

A. That's what we did.

Q. And you didn't think that Exhibit No. 85 made any [p. 116] difference to that, did you?

THE COURT: I think he's – you've asked and answered that question or he's answered it a couple of times.

BY MR. CONFER:

Q. You testified that when you went to see Mr. Leeper about the Gantry crane, he said, what the hell are you doing here?

A. I said that? He said –

Q. He said that?

A. He said that.

Q. Yes. I'm sorry, I may have misspoke. Did Mr. Leeper know that you were going to be coming to Fort Worth to have him sign that contract to your knowledge?

A. No.

Q. He was surprised to see you; isn't that correct?

A. After the Gibson Yard, he was very surprised to see me.

Q. Well, he was surprised to see you in Fort Worth, correct?

A. Yes.

Q. He had no prior notice that you were coming; is that correct?

A. That's true.

Q. And did he have any knowledge – prior knowledge about the Gantry crane contract to your knowledge?

A. No.

Q. And the Gantry crane contract was you testified earlier [p. 117] a $900,000 contract; is that accurate?

A. Near that figure.

Q. And did – Under the terms of that contract, Burlington Northern was going to pay you $900,000; is that a [sic] correct?

A. Yes.

Q. And was that something that Mr. Leeper was going to have anything to do with to your understanding?

A. No.

Q. Were you present when Mr. Leeper called Denver?

A. He went into his office to call Denver.

Q. And you were not in his office?

A. No.

Q. All right. Did Mr. Leeper treat you courteously?

A. I think he did. After I understood his problem that he was faced with, he didn't know what I was doing down there, and I think he tried his best.

Q. He was courteous, correct?

A. Yes, I would say he was.

Q. And he was polite to you?

A. Yes.

Q. Was he friendly?

A. Yes.

Q. You testified about the work that Judds Brothers did on the Rennick Yards. Did Judds Brothers have a – an earthmoving contractor or a dirt contractor on the Rennick [p. 118] Yards job?

A. We worked in tandems with another dirt contractor on the Rennick Yards.

Q. All right. So there was a dirt contractor that was a subcontractor of Judds Brothers; is that correct?

A. There was.

Q. I thought you testified on direct examination that Judds Brothers did all the grading for that project. Would that be inaccurate?

MR. DITTRICK: Object to the form of the question.

MR. CONFER: I'll withdraw it.

THE COURT: All right. Wait. The question may be withdrawn. You may proceed.

BY MR. CONFER:

Q. Judds Brothers didn't do all the grading on that project then; is that correct?

A. No. We shared the grading on the project.

Q. Would you turn to Exhibit No. 101 in front of you, Mr. Judds.

A. (Witness complies.)

Q. Do you have it?

A. Yes. 101, correct.

Q. Are you familiar with Exhibit 101?

A. Yes.

Q. And you're familiar with the projects of Judds Brothers [p. 119] that are listed on Exhibit 101?

A. Not all of the projects, no.

Q. Did you have any part in the preparation of Exhibit 101?

A. No.

Q. I believe you testified that Judds Brothers did not obtain any contracts from Burlington Northern in 1990. Do you recall that testimony? This is on direct examination.

A. It appears that we had – on 6169, it was in the first part of '90, that happened. We apparently had received the job.

Q. You're referring to the Burlington Northern paint job – shop job?

A. Yes.

Q. All right. That was a $213,000 job; is that correct?

A. Yes.

Q. But that was actually performed before 1990, wasn't it?

A. Yes, it was.

Q. All right. Okay. So that was a job that you got from Burlington Northern while the Gibson Yards litigation was going on; is that correct?

A. I don't know whether we had gotten it before – You see I wasn't running the business at that particular time. John was, and I'm not in on all these numbers, so –

Q. Okay.

A. – I'm very weak on something like this.

[p. 120] Q. All right. I – I'll ask – I should ask your son about that then; is that correct?

A. If you would.

Q. I will. Now, these – Just to clarify, you talked about roller-compacted concrete jobs that you had discussed with Burlington Northern in Chicago and Memphis and Minneapolis/St. Paul and Tulsa; is that correct?

A. That's correct.

Q. That was before the Gibson Yards dispute arose; is that correct?

A. That's correct.

Q. All right. And after the Gibson Yards – Yards dispute arose, then Burlington Northern was not interested in using roller-compacted concrete on those jobs; is that correct?

A. They weren't interested in using Judds Brothers.

Q. They weren't interested – Well, according to Exhibit 81 and 85, there was a misunderstanding on Burlington Northern's part about the properties of roller-compacted concrete; is that correct?

A. That was the wording used, but it was – subsoils were the problem, not the roller-compacted concrete. The Denver yard proves that it's very successful.

Q. Well, my question to you is simply that after – after the problem with the Omaha Gibson Yards project, Burlington Northern didn't want roller-compacted concrete; is that [p. 121] correct?

A. I don't know whether they didn't want roller-compacted concrete. They didn't want Judds Brothers.

Q. Well, Judds Brothers was the only company that used roller-compacted concrete; is that correct?

A. No. There were other companies using roller-compacted concrete.

Q. Well, when you say Burlington Northern didn't want Judds Brothers, they did award Judds Brothers a lot of projects according to Exhibit 101; is that correct?

MR. DITTRICK: Your Honor, we're referring to Exhibit – I have no objection to referring to it, but I think we could just offer it and get it in evidence. I have no objection to it.

MR. CONFER: I'll offer it.

THE COURT: You have no objection?

MR. DITTRICK: No objection to it.

THE COURT: Exhibit 101 is received.

BY MR. CONFER:

Q. Do you know whether Burlington Northern offered – Let me back up. Do you know whether Burlington Northern entered into the contracts shown on Exhibit 101 after the Gibson Yards litigation? Do you know?

A. No, I do not.

Q. All right. I believe that you testified that when you [p. 122] called up Mr. Glavin about the Grand Island project and the Lincoln freight pit project, you stated to him that you thought this violated your settlement agreement; is that correct?

A. No. I asked him to look into the problem that we were encountering. I told him about the situation and he was to look into it. I didn't say it violated . . .

Q. I'm sorry. He said he would look into it and get back to you; is that correct?

A. I believe that was the comment that he made, get back to me, yes.

Q. And at least on the Grand Island grade separation project, he did get back to you; isn't that true?

A. I do not remember the – the time that he did get back, but in his deposition he stated that he did get back with me, and I just don't recall that. There was nothing done.

Q. I'd like to have you refer to page 99 of your deposition, Mr. Judds. On Line 17 I asked you, "After you called Mr. Glavin and asked him to look back – to look into this, then he called you back; is that correct," and you answered, "I believe he did." And I asked you, "And when – and what do you recall about the conversation when he called you back." You answered, "I suppose that he said that it was overbudget, and when they resubmitted for bids, well, this is how the bids came in and that was the answer, so we just had [p. 123] to leave it there." Do you recall that?

A. I see that. I recall it, yes.

Q. Okay. So Mr. Glavin did call you back; isn't that true?

A. He must have called me back, yes.

Q. All right. And he told you to the reason that you didn't get the Grand Island grade separation project was that it was over the budget, correct?

A. Yes.

Q. And you didn't believe that your settlement agreement with Burlington Northern required them to accept the Judds Brothers bid if it was over the budget, did you?

A. It wasn't over the budget as we – we find out. It was not over the budget. That what had happened is that –

MR. CONFER: Well, I'll move that the answer be stricken as not responsive.

MR. DITTRICK: Object –

THE COURT: Sustained.

MR. DITTRICK: I'll tender the answer as an offer of proof then.

THE COURT: You can do that on redirect if it's – but I don't think you're in a position to make an offer of proof on a question and answer on cross-examination, Mr. Dittrick. That request will be denied.

BY MR. CONFER:

Q. The question to you, sir, is you didn't believe that [p. 124] your settlement agreement with BN required them to accept a Judds Brothers bid if that bid was over the budget, did you?

MR. DITTRICK: Object to the form of the question.

THE COURT: Overruled.

THE WITNESS: Do you want me to answer it?

BY MR. CONFER:

Q. Yes.

THE COURT: Not with respect to any particular contract, just the general concept is what he's asking you, Mr. Judds.

THE WITNESS: Your Honor, I don't know whether it's the – the first bid or the second bid that we placed in there –

THE COURT: It has nothing to do with that particular bid. The issue is just as a general proposition,

did you expect Burlington Northern to grant you a contract where your bid was low but it was over the budget.

MR. DITTRICK: I'm going to – I'm going to object to the form of the question then, Judge, on the same basis. If there was any expression about that, that can be discussed. If there was no expression, I don't think it's relevant.

THE COURT: Overruled. I think we need to understand that – the response to that question, and I think the – the question needs to be answered, and you may restate [p. 125] it if you wish, Mr. Confer.

MR. CONFER: I will restate it, Your Honor.

BY MR. CONFER:

Q. When the – If the first Judds Brothers bid was over the budget, you didn't believe that the settlement agreement required Burlington Northern to accept that bid, did you?

MR. DITTRICK: Object to the form of the question and relevancy.

THE COURT: Overruled.

THE WITNESS: I'm going to say no.

BY MR. CONFER:

Q. No, you didn't think that the agreement required them to accept the bid?

A. If it was over budget?

Q. Yes.

A. We have had bids that were overbudgeted, and they have accepted them, and they have worked with the contractor is what I'm trying to say. I have to qualify my answer to say that, because we have bid in the past where it was overbudgeted, and I would expect that to work with the contractor that had the low bid, yes.

Q. I think you started out saying no and then answered I guess saying yes.

A. That's why I qualified my – I don't want to get trapped in something, and I'm very careful – I'm not a legal [p. 126] expert and –

Q. I understand, sir, but we're trying to understand what the agreement was. Do you recall testifying in your deposition that you didn't think Burlington Northern would have to accept a bid that was overbudget under the settlement agreement?

MR. DITTRICK: Could I have a reference to the page we're referring to here?

THE COURT: Well, let – you may but let him see if he recalls that question and answer first.

THE WITNESS: I do not recall it, Your Honor.

MR. CONFER: I need to find it, Your Honor.

BY MR. CONFER:

Q. Refer to page 92 of your deposition, Mr. Judds, if you would, please.

A. (Witness complies.)

Q. On Line 14 I asked you, "Well, did you understand that Burlington Northern had a right to refuse a bid

if it was over the budget," and you answered, "Yes, we did." And I asked you, "Did you believe that violated Exhibit No. 15 for Burlington Northern to refuse a bid that exceeded the budget," and you answered, "No;" is that correct?

A. That's what appears, yes.

Q. All right. And Exhibit No. 15 to your deposition was the settlement agreement; is that correct?

[p. 127] A. Yes.

Q. So at that time you stated you didn't think that would violate the settlement agreement to reject a bid that was over the budget; is that correct?

A. In this case, no. It is not correct. We were – we were the low bidder of that project and we should have been awarded the job.

Q. Even though it was over the budget that wouldn't make any difference; is that your understanding?

A. Yes.

Q. So regardless of how much you were over the budget or anything else, you believe that you should have gotten the job; is that correct?

A. I – I don't know what to say on that. I mean, when you can put – maybe double the amount of money, that would be different, but only the amount that we were – was not relevant to the bid. We could have worked out the – the details to – to take care of the over –

Q. Well, is it your understanding that you were $2,000,000 over the budget? Do you know how much you were over the budget, let me ask you that?

A. No, we didn't know how much we were over the budget.

Q. You didn't at that time but have you found out in discovery?

A. I can't answer that.

[p. 128] Q. You don't know?

A. No.

Q. All right. If – if the evidence would indicate that you were $2,000,000 over the budget, would that make a difference to your answer?

A. I can't answer that at this time.

Q. You don't know?

A. No.

THE COURT: We'll take –

BY MR. CONFER:

Q. You also testified about going down to –

THE COURT: Mr. – Mr. Confer, I think we'll take our evening recess at this time. We'll be in recess until nine o'clock tomorrow morning. Again, ladies and gentlemen, I want to remind you of the admonitions I've given you regarding your conduct as jurors during the trial of this case and ask that you keep it in mind. The court will be in recess.

(The jury was excused at 4:30 p.m.)

(Offer of proof made.)

THE COURT: Mr. Dittrick, you wanted to take up a matter at recess regarding a ruling I made, and I forget exactly which offer of proof it is now that you had reference to, but you may you may proceed.

MR. DITTRICK: We made an offer of proof regarding [p. 129] Mr. Judds' testimony that he has first-hand knowledge that the Burlington Northern does, in fact, blackball certain construction contractors.

THE COURT: Yeah, on blackballing. You may proceed.

MR. DITTRICK: And the Court sustained an objection to that I believe on the basis of relevancy although Mr. Confer did make the objection on the basis of 403 also. I think it's directly relevant, Judge, to the issues before this case. Does the Burlington blackball companies? Does it have a history of doing that? Has it blackballed other people? We're going to have evidence that, in fact, the Burlington has memorandums, and it doesn't want HWS doing any more work for it. Mr. Judds has testified that other contractors have, in fact, been blackballed by the Burlington Northern. We think that's the case here, and I think that's relevant to the issue, Judge, that they have a history of doing that, and they have done it. We think it's relevant. I think it's very relevant.

THE COURT: Mr. Confer.

MR. CONFER: Well, Your Honor, Burlington Northern is a private company. It has the right to do

business with anybody that it chooses to do – to do business with unless there's some contractual agreement like has been alleged in this case that would place some restrictions on that, but [p. 130] they don't have to deal with anyone that they don't want to any more than I have to go shopping at Ace Hardware if I don't want to, and to place a term like blackball on it without any description of the circumstances would just divert the jury's attention from the real issues in this – in this particular case, and then if you do try to describe the circumstances, you're again into a 403 situation where you're wasting the jury's time by trying another case with another – regarding another contractor that isn't even involved in this, so it's not really – it doesn't tend to prove or disprove the issues in this case, so it's not relevant, but even if it were relevant, the chances of the prejudicial value outweighing its probative value are extremely high, and the chances of it confusing the jury are also extremely high, so we believe that under either relevance or Rule 403, the objection should be sustained.

MR. DITTRICK: I would like to refer the Court to page 34 of the deposition of William Glavin which we took in this case –

THE COURT: See, I don't have the depositions.

MR. CONFER: I'm sorry, page –

MR. DITTRICK: Thirty-four.

MR. CONFER: Thirty.

MR. DITTRICK: Thirty-four. May I approach, Your Honor?

[p. 131] THE COURT: You may. You can hand it to Miss Scigo.

MR. DITTRICK: And I'm referring, Judge, to Volume 8 on Page 34, and it goes through Page 35, Line 13. Beginning at Page 34, the question is asked of Mr. Glavin at that time you were writing Exhibit 16 –

THE COURT: Is that the letter of January 22nd?

MR. DITTRICK: Yes, Your Honor.

THE COURT: All right.

MR. DITTRICK: The letter of January 16th, the first letter.

THE COURT: You mean –

MR. DITTRICK: No, no, the letter of January 22nd. You were –

THE COURT: All right.

MR. DITTRICK: "At the time you were writing Exhibit 16, was it your intention to preclude or to forbid Judds Brothers to bid on any future Burlington Northern work?" Answer, "Absolutely not." Question, "Why not?" answer, "Because as part of the discussion that led to the settlement, Ray had the ability to bid on other Burlington Northern projects." Question, "To your understanding was that something that was important to Mr. Judds?" answer, "Yes." Then on Line 23, "And why was that important to Mr. Judds as part of the settlement," top of Page 35, "to [p. 132] your understanding," and Mr. Glavin's answer is, "Ray wanted to have additional work, and he didn't want to be quote, unquote, blackballed by

the Burlington Northern Railroad for the problems that had occurred in the – at the Gibson Yards."

Question, "And, Mr. Glavin, was it your understanding at this time that you were trying to take steps in the settlement agreement to assure Mr. Judds that he was not being blackballed by the Burlington Northern?" Answer, "We took steps on the settlement agreement to make sure that the relationship was normalized and that he would be treated the same as any other contractor." Question, "And when you say he would be treated the same as any other contractor, can you define that for us, please?" Answer, "That he would have the ability – he would have the same rights, response and ability to bid on projects as any other contractor has with the Burlington Northern Railroad." "And was this part of the settlement agreement that you were working on that you were reaching with Judds on January 16, 1990?" Answer, "Yes, it would have been."

I think that the concern Mr. Judds had about being blackballed, his knowledge that the Burlington Northern had blackballed people in the past and Mr. Glavin saying that was surely part of the agreement is very relevant testimony.

THE COURT: Well, I'm not inclined at this time to [p. 133] change the ruling. I'll take a look at this over the evening, and if I have any different thoughts about it, I'll let you know in the morning.

MR. DITTRICK: Thank you, Judge.

THE COURT: All right. We'll be in recess.

(Recess at 4:38 p.m.)

* * *

[p. 137] (At 9 a.m. on March 31, 1998, the following proceedings were had with all parties present and the jury not present:)

THE COURT: Last evening we had a brief hearing with respect to the ruling of the Court which – after the witness had testified that he was aware that in the past Burlington Northern had blackballed bidders or other companies from bidding. The further questions were sought to be elicited – or were asked to elicit additional information about the scope of that knowledge, and I sustained an objection to that as being violative of Rule 403 and of being not relevant.

My ruling as Mr. Dittrick I think properly stated was premised primarily on the fact that I didn't believe that it was relevant. I have since again reviewed Mr. Glavin's deposition, and I presume part of those depositions are going to be offered. I think the – that going beyond the – going beyond the fact that they have blackballed, and there's going to be evidence from Mr. Glavin that Mr. Judds indicated he did not want to be blackballed, and he wanted to continue to do business about Burlington Northern goes as far as needs to be with respect to this issue, and so my ruling will remain the same.

I'm not going to get into a history of blackballing of what the defendant's knowledge was. The fact is that if [p. 138] there is a contract here, it seems to me as I read this – and I spent some time last night looking at some cases, and I'm still not – nothing that I'm saying here is written in stone by any means, but it seems to me that a document, Exhibit 81, dated January 16, 1990 is not the

contract that the parties are really suing on. There's nothing ambiguous about that document. It looks to me like when you read paragraph d, it doesn't make any reference to any continuing relationship or continuing to do business. That agreement, if it was entered into, was an oral agreement at the time which if it was memorialized at all was memorialized in part or at least referenced in part in the letter of January 22, 1990.

Now, that seems to me to be the posture of this case, and I'm not saying that that's where I'm going to end up, but it seems to me that's the direction we were coming from, and, Mr. Dittrick, let me address you first. I don't know whether you agree with that or not, but I would appreciate your thoughts on the observations that I have just made in that regard.

MR. DITTRICK: I believe, Judge, that the – or, Judge, at the meeting on January 16, 1990, there were a number of agreements that were made by the parties. Certainly to dismiss the lawsuit, that was agreed upon, certainly to pay Judds Brothers 250,000, that was agreed [p. 139] upon.

THE COURT: The subcontractor.

MR. DITTRICK: The subcontractor. I mean, certainly that was agreed upon, but we think as part of that meeting, there was also an agreement –

THE COURT: Yeah, but it wasn't – it was not a part of the January 16 document.

MR. DITTRICK: Well, it was and it wasn't. I mean, the January 16th referred to that letter and the reason for that letter was as Mr. Confer says, Judge, in

part for bonding and for insurance to show people, but it was also to memorialize the agreement that Judds would continue to be a contractor and was going to be treated like everybody else was. I mean, that was –

THE COURT: There's nothing in the January 16 document that says that or even infers it really as I see it. I mean, that's where I'm having the difficulty with the January – it just – it says that they'll write a letter –

MR. DITTRICK: True.

THE COURT: – and that letter was written. The letter in addition – the second paragraph –

MR. DITTRICK: Yes.

THE COURT: – of the letter is the document that presents this issue that we're involved in. Now, I don't – I think you could have several – well, I won't say that [p. 140] categorically, but, you know, you could enter into certain – several agreements at one time and not put them all in one document. I have no problem with that.

MR. DITTRICK: Agreed.

THE COURT: It just doesn't seem to me that the January 16th document is the basis for the plaintiff's claims in this case. Now, as I say this isn't –

MR. DITTRICK: I understand.

THE COURT: I'm just expressing some concerns that I have so that you understand maybe better some of the rulings that I'm making.

MR. DITTRICK: And I think I understand your concerns, Judge, and I think – I think I – I'm in agreement

with the Court that we need to hear all the evidence. We need to hear Mr. Glavin's testimony and Mr. Judds, and we'll wrestle with this later.

THE COURT: Yeah, we will be, but I'm trying – I'm trying to get things a little bit into perspective, but – but as long as you're aware of what I – my concerns are, then maybe you can be addressing those as we go through this case.

MR. DITTRICK: I understand, Judge.

THE COURT: Mr. Confer, if you want to make any comments with respect to what the Court just said.

MR. CONFER: Yes, Your Honor, I do. May I have [p. 141] just a second here?

THE COURT: While he's looking, Mr. Dittrick, how far behind schedule are we right now would you say?

MR. DITTRICK: Actually, Judge, I don't think we're too far behind. I mean, I'm assuming he doesn't have too much more with Mr. Judds. I certainly don't have more than 10 or 15 minutes with Mr. Judds. I'm then going to read the portions of Mr. Glavin's deposition. I'll put Kevin Steele on the stand after that, and if we have time, I may either read Mr. Moy's deposition or put Mr. Moy on the stand, some segments of other depositions and then John Judds. I think – I told Rod I'm trying to get done by Wednesday morning with my case. I think I'm going to be in that ballpark.

THE COURT: All right.

MR. CONFER: Your Honor, if – if I may respond to the – the Court's inquiry I think – I think that is the crux of the issue here. What is this January 22nd, 1990 letter? And it's our position, and I think that the Exhibit 81 says this, that the terms of the settlement are in the January 16, 1990 letter, and I – that letter seems to me to be quite unambiguous as the Court has pointed out. It says what Burlington Northern is required to do and that those terms of settlement are to remain confidential. Mr. Judds has admitted in his deposition that that was – the [p. 142] January 16th, 1990 meeting was the only time when they talked about settlement, that those were the terms of settlement. There wasn't any – anything that he recalled that was not reflected in that January 16, 1990 letter.

THE COURT: I might say I might not agree with you entirely on that, Mr. Confer, and so that you, I mean, understand, he has testified and as I read page 34 of Mr. Glavin's deposition, it confirms in part what Mr. Judds testified to is that he was concerned about having a continuing business relationship with Burlington Northern as a means in part of recouping some of the losses that he had, and Mr. Glavin recognizes this, and now this letter is written, and the letter is not entirely clear on that point.

MR. CONFER: But the letter is the letter that's referred to in paragraph d, and the purpose of the letter, I think both parties are agreed, was to show bankers and bonding companies, and that letter could be made public. Under the January 16, 1990 letter, the terms of the settlement could not be made public. This letter could be made

public, so these aren't terms of settlement. Moreover, if you look at the pleadings that

THE COURT: Well, I'm looking at the pretrial conference because I think the pretrial order supersedes the pleadings, and if it's not in the pretrial order, it's not in the case anymore, and I think that's our rule here in [p. 143] Nebraska.

MR. CONFER: But isn't it – I guess the Court can tell me whether I'm wrong. I believe that there are judicial admissions made in the counterclaim which are on or about – in paragraph five the statement is made on or about January 16, 1990, Judds Brothers Construction and the Burlington Northern Railroad entered into an understanding and agreement to settle the litigation and claims arising out of the construction work performed at the Gibson Yards intermodal facility. Pursuant to that settlement agreement, the terms of which were to be confidential, the Burlington Northern orally and in writing agreed that thereafter that Judds Brothers Construction Company would continue to be a supplier of construction services to the Burlington Northern Railroad Company.

Such oral and written representations were made on and before January 22nd, 1990. These oral and written contracts and representations carried with them an implied covenant of good faith and fair dealing and provided for the continuing opportunity of the defendant to bid on Burlington Northern projects. Your Honor, the January 16, 1990 letter doesn't have anything like that in it, and if there were oral representations, then they're at variance with the January 16, 1990 letter.

THE COURT: Well, I understand your position in [p. 144] that regard, Mr. Confer, and – all right. Well, I really don't want to say too much more. Now, I – I'm – I spent some time last evening with this, because I'm trying to get it sorted out in my own mind a little bit, and I think both of you sort of – I hope both of you kind of understand preliminarily where I think I stand right now, but I do think I need to hear the plaintiff's evidence in this case before I can make any final rulings on this matter, so if you will bring in the jury, please, we will proceed.

Just one minute before you do. The reason – another reason on that blackballing that I've ruled, if there was an agreement that they would continue to be bidders and so forth, then blackballing would be a violation, and it doesn't make – it doesn't make any difference what Burlington Northern may have done in the past. If they – if they refused to do business with them and there was an agreement to the contrary, that's a breach of the agreement. If there is no agreement, it doesn't make any difference. They can blackball anybody. I know of no law that says Burlington Northern has to do business with anybody. There's got to be an agreement that they're going to do this, and so what Burlington Northern may have done in the past I – with respect to blackballing, I – it's totally irrelevant to the issues in the case. I wanted to explain that to you.

You may bring in the jury.

[p. 145] (Jury present at 9:10 a.m.)

THE COURT: Ladies and gentlemen, I think we're ready to proceed. Mr. Judds, if you'd return to the witness stand, please.

MR. JUDDS: Yes, Your Honor.

THE COURT: All right. Mr. Confer, you may proceed.

MR. CONFER: Thank you, Your Honor. May I approach?

THE COURT: You may.

CONTINUED CROSS-EXAMINATION

BY MR. CONFER:

Q. Mr. Judds, just to be clear, looking at Exhibit 81, these paragraphs a, b, c, d and e, you don't contend that Burlington Northern didn't do what it says in those paragraphs, do you?

A. No.

Q. And there's a reference in paragraph a to Consolidated Mixing Company. Is that a company that you owned stock in at that time?

A. Yes.

Q. All right. Now, you've been bidding on Burlington Northern projects for many years; is that correct?

A. Yes.

Q. And are you familiar with the standard Burlington [p. 146] Northern bid documents?

A. Somewhat.

Q. Are you aware of whether those documents state that Burlington Northern has a right to reject any and all bids?

A. Yes.

Q. You are aware of that?

A. Yes.

Q. And they do have that in there; is that correct?

A. They do.

Q. And that's a fairly standard provision in most contract – contracting bid packages; is that correct?

A. Yes.

Q. As far as the work that Judds Brothers did on the Gibson Yards in Omaha, Nebraska, did Judds Brothers use Negus-Sweeney as a subcontractor on that project?

A. Yes.

Q. And is Negus-Sweeney what's generally referred to as a dirt contractor?

A. Yes.

Q. What – what's a dirt contractor mean to a – in the contracting industry?

A. It's a contractor that furnishes the heavy equipment machinery and does the cutting and filling of a – of soils to bring the subgrades to their conformity as the contract calls for.

[p. 147] Q. And you say that they have certain types of heavy equipment to do that?

A. They do.

Q. All right. And that – Is one of those kinds of equipment a scraper?

A. Yes.

Q. And what is a scraper?

A. A scraper is a movable piece of equipment that is self-loading, and it carries between 16 to 22 cubic yards of soil, and it carries it from one point to another.

Q. And does Judds Brothers possess a scraper?

A. No. We had in the past, but we don't.

Q. All right. And am I correct that Judds Brothers hasn't done any large grading jobs for Burlington Northern in the past several years without also using a dirt subcontractor?

A. Yes.

Q. And isn't it true that you tend to get a better quality when you – the prime contractor – Maybe we need to define prime contractor. What is a prime contractor?

A. A prime contractor is a contractor that is in charge of the complete job, and he is overseeing the subcontractors and the material suppliers.

Q. All right. So, for example, if Burlington Northern was going to enter into a contract with Judds Brothers to build a particular project, then Judds Brothers would be the prime [p. 148] contractor; is that correct?

A. Yes.

Q. And then Judds Brothers would arrange with any subcontractors to do certain parts of that work, correct?

A. They would arrange to do the work prior to the bidding of the project with the subcontractors.

Q. And Burlington Northern – In this hypothetical situation we're talking about, Burlington Northern wouldn't have any contracts with those subcontractors, would they or would it?

A. In the case of where they separated the general contractor – for instance, this present job we're doing right now, they have electrical contractors, they're furnishing their own forces. They have done it in the past and they continue to do so.

Q. But in a typical situation, the prime contractor enters into contracts with a subcontractor; is that correct?

A. Yes.

Q. And the prime contractor is the one that's accountable to the owner of the property to get that project done; is that correct?

A. Yes.

Q. And isn't it true that when the prime contractor uses its own forces, you tend to get a better quality of project?

A. In what way do you mean his own forces? The men that [p. 149] they employ or –

Q. Yes.

A. Not necessarily, no.

Q. Do you recall stating previously in your deposition that you feel that you get a better quality of project when you use the prime contractor's own forces instead of a subcontractor?

A. In the metal building fabrication and setting up a metal building is what I was making reference to.

Q. And why would you believe that you get a better product in that situation when you use the prime contractor's own forces?

A. Because of the similarity of the type construction, the material handled in that particular program. This happened to be a metal building that we were establishing our bidding on, rather, with the Burlington and the – the manpower that were familiar and the equipment that we handled that building with – you know, handled for that building.

Q. Well, the subcontractors aren't directly accountable to the owner, are they?

A. In the – in a sense they are.

Q. In a sense they are, but, actually, they don't have any contractual relationship between them, do they?

A. The owner can force a subcontractor to be removed from the project.

[p. 150] Q. How would he do this? He'd go to the prime contractor, right?

A. He would go to the prime contractor and have that contractor removed.

Q. So he has to deal through the prime contractor when he's got a problem with a subcontractor?

A. Yes.

Q. If he has a problem with a prime contractor, he goes to the prime contractor, correct?

A. Yes.

Q. So it removes a step if he's dealing with the prime contractor rather than a subcontractor, correct?

A. Yes.

Q. Now, you testified yesterday, I believe, that you're – you retired as the president of Judds Brothers five or six years ago, I believe?

A. I – I retired in – in 1989. Not retired from the company, but I'm not the president of the company. I turned that office over to my son.

Q. So that's actually been nine years ago; is that correct?

A. That's correct.

Q. All right. And are you more or less in an advisory capacity at the present time?

A. Yes.

Q. Now, when you were active in Judds Brothers' business, [p. 151] you had a practice of calling on Burlington Northern people who awarded contracts; is that correct?

A. Yes.

Q. And you would go to them to discuss the types of work that Judds Brothers would like to be doing for the Burlington Northern Railroad; is that correct?

A. Not necessarily. I made visits to their office and learned of projects coming up and – but never advised them in any way. Then we – we eventually were sent plans. They had knowledge of me.

Q. Well, I believe you went to – you testified in your deposition you went to St. Paul, Minnesota when an engineering department was up there more than probably ten different times; is that correct?

A. Yes.

Q. And then when the engineering department – Well, when you went to St. Paul, didn't you tell them that Judds Brothers did bridge work and utilities work, concrete work, built buildings, and you'd like to have those kinds of projects from Burlington Northern?

A. Yes. I was always selling.

Q. Okay. And then the – there came a time when the Burlington Northern engineering department moved to Denver; is that correct?

A. Not only Denver, but they broke up the – the [p. 152] engineering department at St. Paul, and they made five regional offices and they were located in – You want the locations?

Q. Sure.

A. They were located in Dallas/Fort Worth, located in Denver, Spokane, let's see, Kansas City, and I'm short on one more, I think, but there was five different offices.

Q. Okay. And there were certain regions within each of those offices where they were responsible for awarding contracts; is that correct?

A. Yes.

Q. All right. And most of the work that Judds Brothers was interested in doing was coming out of the Denver and Chicago offices; is that correct?

A. I visited the Denver office, the Chicago office and I visited the Kansas City office.

Q. And, in fact, you went to the Denver office probably about 30 times; is that correct?

A. Yes.

Q. And you would visit with Carl Wolfe, correct?

A. Carl Wolfe was one of the engineers.

Q. And William Ferryman?

A. Yes. William Ferryman was an engineer.

Q. Jerry Helm?

A. Jerry Helm was an engineer.

[p. 153] Q. And I can't remember Mr. Gustofson's first name, but you visited with him as well?

A. Yes.

Q. And he was also an engineer?

A. Yes.

Q. And all of these engineers were responsible for awarding projects; is that correct?

A. Yes.

Q. And, again, you were selling them saying, we do bridge work, utilities work, concrete work, we build buildings, we want your work; is that correct?

A. We had in the past did this for the Burlington Northern, yes.

Q. And you were keeping contact with those people; is that correct?

A. Yes.

Q. And you also testified you went to Chicago and Kansas City and did the same kind of thing?

A. When we got into the roller-compacted concrete is when I first visited Chicago and Kansas City.

Q. All right. So yesterday you talked about this brochure and your marketing efforts, but you did those types of marketing efforts not just for roller-compacted concrete but for the bridge work and other work that Judds Brothers did, correct?

[p. 154] A. At this point, I was promoting the roller-compacted concrete.

Q. But before that you were promoting bridge work, utilities work, building buildings, correct?

A. Yes, yes.

Q. And after you retired from being the president of the company, those activities of going around and promoting stopped; is that correct?

A. No. My son and our agents picked it up.

Q. Okay. They would know what they had done; is that correct?

A. Yes.

Q. All right. Now, when you say your agents, are you referring to Mr. Ory and Mr. Wolfe?

A. Yes.

Q. All right. And Mr. Ory was a person that was hired as a salesman to promote roller-compacted concrete; is that correct?

A. Yes.

Q. And he left the company about the time of the Gibson Yards dispute; is that correct?

A. Yes.

Q. So that would be in 1987?

A. Yes.

Q. And Mr. Wolfe was a former Burlington Northern employee; [p. 155] is that correct?

A. Yes.

Q. And you had hired him as a – another person, and one of his duties was to go around and promote roller-compacted concrete?

A. Yes.

Q. And he also left the company about 1987?

A. I think it was 1988 that he left the company.

Q. All right. And since your retirement then in 1989, it would just be your son and other employees of Judds Brothers who've been doing these promotional activities?

A. Yes. Kevin Steele would be one.

Q. All right.

A. And John Judds.

Q. Now, you testified about a trip that you made to Fort Worth to meet with Mr. Hudak. Do you recall that?

A. Yes.

Q. Okay. And that wasn't a trip to promote your services, that was to find out why you hadn't gotten the freight bid, contract?

A. To look into why we had not been awarded the job, yes.

Q. I believe that you testified yesterday that you had set that meeting up by telephone?

A. Yes.

Q. And what you meant by that was that you called and left [p. 156] a message on his answering machine; is that correct?

A. Yes.

Q. You did not speak to a secretary or anybody like that and say, will he be available?

A. No.

Q. And you didn't talk to Mr. Hudak to ask him if he would be available?

A. No.

Q. You got on a plane and went down there without any appointment being set up; is that correct?

A. Yes.

Q. And when you got there, you found out that Mr. Hudak was not available; is that correct?

A. Mr. Hudak was in and said that he would see me, and I waited it must have been between 45 minutes maybe to an hour and in – the second floor of the Fort Worth – their offices I think are on the 15th floor or the 14th floor, in there somewhere, and then after that I called up there, and – and his secretary said he would not be able to meet with me.

Q. Okay. Now, when you said that Mr. Hudak said that he would meet with me, you didn't talk to him, did you?

A. No.

Q. You were testifying yesterday about the jobs that Judds Brothers had received from Burlington Northern in recent years. Do you recall that?

[p. 157] A. Would you enlighten me on what you're asking there?

Q. I'll try.

A. All right.

Q. I believe you stated yesterday that in 1997 you think Judds Brothers was only invited to bid on one project. You weren't sure?

A. I'm still not sure on the dates. The dates have a problem with me.

Q. Okay. You're not the only one. Now, there's another company that is an affiliated company of Judds Brothers called Apollo Steel; is that correct?

A. Yes.

Q. All right. And Apollo Steel is also owned by the Judds family; is that correct?

A. Yes.

Q. And does – Has Havelock shops also awarded jobs to Apollo Steel over the years?

A. Yes.

Q. Are you familiar with the jobs that have been awarded under – to Apollo Steel over the years?

A. No.

Q. Who would be familiar with that?

A. Possibly Dana Johnson. He's no longer with the firm.

Q. What about – Who runs Apollo Steel now?

A. John Judds is the in charge of Apollo Steel at this [p. 158] point.

Q. Okay. So John would – John Judds would be the person who would be most knowledgeable about that?

A. At that particular time, he was not involved in it. Dana's only been gone since about three years ago.

Q. And as far as whether Judds has built – bid on projects in – at Havelock in 1997, who would be the person most knowledgeable about that?

A. John Judds.

Q. Mr. Judds, would you turn to Exhibit 96 in the book in front of you.

A. (Witness complies.)

Q. Are you familiar with Exhibit 96?

A. This is the first time I've looked at 96.

Q. Are you familiar with the receipts that Judds Brothers has received – received from the tie rehabilitation project with Burlington Northern Railroad?

A. I'm not – I'm not knowledgeable as to the amounts or anything like that, no.

Q. Well, you testified yesterday that Judds Brothers was receiving about $3,000,000 a year from Burlington Northern around this '86/'87 period; is that correct?

A. I believe I made that statement, yes.

Q. Okay. And how did you – how did you know about that?

A. How did I know about it?

[p. 159] Q. Yes.

A. Hearsay.

Q. That would be again something that you'd – you weren't directly involved in; is that correct?

A. That's right.

MR. CONFER: I don't believe I have anything further.

THE COURT: Any redirect?

MR. DITTRICK: Thank you, Judge.

REDIRECT EXAMINATION

BY MR. DITTRICK:

Q. Mr. Confer asked you some questions about the tie plant operation. When approximately did the fire at that tie plant take place, Mr. Judds?

A. It was in 1991.

Q. Yesterday Mr. Confer referred to some exhibits, Exhibits 111, 112 and 113 (sic) which were various letters between Judds Brothers and the Burlington Northern. Do you remember those?

A. Yes.

MR. CONFER: Excuse me.

MR. DITTRICK: Just two letters, 211, 212, 213.

MR. CONFER: Yeah.

BY MR. DITTRICK:

Q. Mr. Judds, before those letters were written, did you [p. 160] have conversations with the Burlington about renewing that tie contract because of the fire?

A. Yes, I did.

Q. What'd you ask the Burlington?

A. What – I – I told the Burlington that the cost of putting the plant back into its present – or prior condition so we could make the plant work and do their project for them, that we were going to expend at least $350,000 which that was just the equipment that we needed to do, and then after that we were also confronted with the city and the county health departments and the zoning people as to would we be able to even rebuild the plant without putting permanent buildings there. We had temporary buildings at this plant, and we were on a temporary permit, and I knew that the cost was going to exceed any possibility of revenue that we would receive on the short time yet left on the tie contract, and so I came to the Burlington and asked them they would renew and extend the operations – or the contract with our company so we could provide that service if we went into the additional funds, and –

Q. And who did you talk to there?

A. Mr. Bosshart.

Q. And what was his response to your request?

A. He said no.

Q. And did you – did you then terminate that contract?

[p. 161] A. Under the – the contract that was provided for us by the Burlington Northern, there was a termination that we could use. We didn't want to, but we had to use that in order to satisfy bankers and – and the bonds people.

Q. Now, did the Burlington then award or renew that contract with someone else?

A. Yes.

Q. With who?

A. I can't think of the name right now that they renewed it with, but it was a local firm in Denver.

Q. Why – Were you shocked at that action?

MR. CONFER: Well, objection, irrelevant.

THE COURT: Well, I'm going to sustain it on the grounds that it's a leading question, and you may restate the question.

BY MR. DITTRICK:

Q. How did you feel about their failure to renew?

MR. CONFER: Objection, irrelevant.

THE COURT: Sustained.

BY MR. DITTRICK:

Q. Were you concerned about their failure to renew the contract?

A. Yes.

MR. CONFER: Same objection.

THE COURT: Oh, I'll let that answer stand.

[p. 162] BY MR. DITTRICK:

Q. Why were you concerned?

MR. CONFER: Same objection.

THE COURT: Sustained.

BY MR. DITTRICK:

Q. Now I want to refer you to Mr. Confer's questions to you about the conversation you had with Mr. Leeper in Texas in May of 1993. You recall those questions he was asking you?

A. Yes.

Q. Now, had you come in contact with Mr. Leeper before that May 1993 conference with him?

A. Yes.

Q. And where had you met Mr. Leeper before?

A. He was the engineer responsible for the Gibson Yard in Omaha.

Q. And what discussions did you have with Mr. Leeper about the Gibson Yard project?

MR. CONFER: I'll object. Beyond the scope of cross.

THE COURT: Overruled.

THE WITNESS: He was the – the engineer that –

MR. CONFER: Excuse me. May I also object on the basis of foundation? I don't know what time we're talking about.

MR. DITTRICK: In 1987.

[p. 163] THE COURT: About what time in 1980 . . .

MR. DITTRICK: Right when the problem with the concrete arose.

MR. CONFER: I'd object and – Your Honor, on the basis of Rule 403, Rule 408.

THE COURT: Well, I'm going to overrule the objection, Mr. Confer. The – You explored with him somewhat the conversation with Mr. Leeper and the fact that Mr. Leeper had not been expecting him and so forth and had gone into that. I think I'm going to permit him to establish the background for his relationship or knowledge of Mr. Leeper, so he may answer the question.

THE WITNESS: He was the engineer that – that demanded that we tear up the concrete and refurnish concrete on the fail – failed subgrades at Omaha, and when we tried to discuss it with him, he fired us and threw us off the job. I can add too that he was –

MR. DITTRICK: That's enough.

THE COURT: You've answered the question.

BY MR. DITTRICK:

Q. That's enough. I don't want to take too much time, so I want – I want to move to another area of Mr. Confer's examination. He made certain references, Mr. Judds, to your deposition, and he pulled some selected portions off regarding your conversations with Mr. Glavin. And I want to [p. 164] refer you to that portion of

your deposition that's on Page 66. Do you have a copy of your deposition in front of you?

A. No, I do not.

THE COURT: You may approach, Mr. Jolley.

MR. DITTRICK: Sorry.

MR. JOLLEY: Thank you, Your Honor.

MR. CONFER: May I have just a moment, Your Honor?

THE COURT: You may.

MR. CONFER: I seem to have lost that. Thank you. What page were –

MR. DITTRICK: Page 66.

BY MR. DITTRICK:

Q. And, Mr. Judds, at Page 66 of your deposition, beginning at Line 7, did Mr. Confer ask you these questions and did you give these responses in – beginning at Line 7, Page 66. Mr. Confer's question, "Now, you stated then – was it after that that you stated that you wanted to be able to bid on future jobs, and if you were the low bidder, you wanted the award of that job?" Answer, "That's right." Mr. Confer's questions, "And what was his response to that?" Answer, "He had no problem with that." Was that the question and answer he asked you at the deposition?

A. Yes.

MR. CONFER: Your Honor, under the doctrine of completeness, I'd like to read the next –

[p. 165] THE COURT: I don't have the deposition in front of me.

MR. DITTRICK: I think we have another copy, Judge. May I approach?

THE COURT: You may.

MR. DITTRICK: And I have no objection, Your Honor, and I'll continue to read at Page 66.

THE COURT: All right. Well, let me . . . And you're beginning then on what line? At Line 14?

MR. DITTRICK: I'll begin on Line 14, yes.

THE COURT: Okay.

BY MR. DITTRICK:

Q. And Mr. Confer asked the question, "What do you recall him saying about if you were the low bidder you would be awarded the job?" Answer, "I think that that was the way they'd done it in the past. If we were the low bidder on the job, that job was awarded to us." Mr. Confer continued, "Was there any discussion about what might occur if Judds Brothers was the low bidder but the bid was over the budget on the project?" Answer, "We didn't discuss that." Were those questions asked and those answers given?

A. Yes.

THE COURT: Does that satisfy your –

MR. CONFER: Yes, Your Honor.

THE COURT: – request for completeness?

[p. 166] BY MR. DITTRICK:

Q. Mr. Confer also asked you some questions about the Gantry crane. Do you remember that?

A. Yes.

Q. According to your best recollection, Mr. Judds, when the project was bid, how much was Judds' bid on the Gantry crane?

A. I answered 900,000.

Q. Okay. Now, yesterday Mr. Confer offered Exhibit 101 into evidence, and looking at Exhibit 101, the second page, the repair of the overhead crane, how much was that contract ultimately for?

A. $856,402.

Q. Now, was that because of change orders?

A. Yes.

Q. Going back again to your conversation with Mr. Glavin in 1990 – in January of 1990, previous to that conversation, had Judds Brothers bid on a cafeteria job at the Havelock facilities in Lincoln, Nebraska?

A. Yes.

Q. Why was Judds trying to be the low bidder on that job?

MR. CONFER: Your Honor, at this point I believe we're beyond the scope of recross.

THE COURT: Well, we certainly – it seems to me we've gone beyond the scope of recross as to why – as to why he bid on a particular project.

[p. 167] MR. DITTRICK: I think I should talk to the Court –

THE COURT: You may approach, a side bar.

MR. DITTRICK: – about where I'm going.

(At side bar on the record.)

MR. DITTRICK: The conversation here is that he – they bid on this cafeteria job trying to get the job, tried to be low, they did not get the job so that he was really concerned he was not going to be able to get bids from the Burlington. That's why he had this conversation – was another reason why he had this conversation with Glavin about we'd continue to bid on jobs, and I don't want to use the word blackball – continue to bid on jobs, and we're being treated like other contractors. He later found out, in fact, that they had been the low bidder on this job, and they weren't awarded it. But he – One of the reasons he was going, talking to Mr. Glavin about all this stuff was he wanted to be sure that they could bid on jobs and be treated like other contractors.

THE COURT: Mr. Confer.

MR. CONFER: Well, it's just beyond the scope of – of recross, and so I can't go back into it as I understand.

THE COURT: Yeah. That's true.

MR. CONFER: And it's never been raised before on direct or cross, so it's a new thing.

[p. 168] THE COURT: I'll going to sustain the objection.

MR. DITTRICK: Could I have my statements considered as an offer of proof, Judge?

THE COURT: Yes, you may.

(End of discussion at side bar.)

MR. DITTRICK: Now, may I approach the easel, Your Honor?

THE COURT: You may.

BY MR. DITTRICK:

Q. Mr. Judds, yesterday Mr. Confer with regard to Exhibit 85 asked you some very specific questions about that sentence that said the lawsuits associated with this project arose from a misunderstanding of the parties. You remember him addressing that question to you?

A. Yes.

When you met with Mr. Glavin on January 16th of 1990, what discussions did you have with him about those misunderstandings?

A. I told him that the moisture contents –

MR. CONFER: Your Honor, again, I think this is beyond the scope of recross.

THE COURT: Overruled.

THE WITNESS: I told him that the moisture contents had been waived on the subsoil, I told him that the decimmiters (ph) had not been calibrized (sic) that tested [p. 169] the compaction of the subsoils and the – the roller-compacted concrete, and I told him that core samples were not taken.

BY MR. DITTRICK:

Q. Did Mr. Glavin then agree to write something about these misunderstandings?

A. Yes, he did.

Q. Mr. Confer asked you today about the language in the Burlington's contracts stating that they always reserve the right to reject bids. You recall that testimony?

A. Yes, I do.

Q. Mr. Judds, in your practice with the Burlington in the past, what has been their practice about awarding contract projects to low bidders?

A. With – with the . . . Just a minute, Your Honor. It has been the practice we've experienced with the Burlington Northern that they do award the low contract – the low bid, because they are the ones that put out the plans to the contractors and to bid on – they invite the contractors to bid on, and so they do award to the low bidder unless there's a discrepancy in the bids.

Q. Now, Mr. Judds, when you were a contractor, if the Burlington was not going to award the project to the low bidders, would you even bother to bid on the project?

MR. CONFER: Well, I'll object. It's leading, [p. 170] it's –

THE COURT: Sustained.

BY MR. DITTRICK:

Q. Was that practice that you were aware of of Burlington awarding low bids – awarding contracts to the

low bidders – was that something that was important to you while you were dealing with the Burlington?

MR. CONFER: Objection, irrelevant.

THE COURT: Overruled. I'll let him answer that.

THE WITNESS: Yes.

BY MR. DITTRICK:

Q. Why?

A. Because we put in a lot of time in preparing bids, and we – it costs – time is money to a company, and we expected to do the job if we were the low bidder.

Q. Now, Mr. Confer asked you a question about the present job that Judds is doing.

MR. DITTRICK: May I approach also, Your Honor?

THE COURT: You may.

BY MR. DITTRICK:

Q. And shown on the second page of Exhibit 101 is what's called to – the B-2 fueling facility. You see that?

A. Yes.

Q. And that contract was awarded in 1996?

A. Yes.

[p. 171] Q. And the numbers on Exhibit 101 show costs through '97?

A. Yes.

Q. Now, in 1996 did Judds complain to the Burlington that you weren't getting the opportunity to bid on projects?

MR. CONFER: Your Honor, I believe –

THE COURT: Sustained.

MR. CONFER: – this is beyond the scope of cross.

THE COURT: Sustained.

MR. DITTRICK: Your Honor, he brought up the issue of the B-2 West facility.

THE COURT: Yeah. The difficulty – the – the – the difficulty that we have is that the witness as I recall on direct examination really somewhat disqualified himself with respect to the information on Exhibit 101 in that – it seems to me and that's got to be gone into with someone else.

BY MR. DITTRICK:

Q. All right. Without reference to Exhibit 101, did you play a role on behalf of Judds Brothers in 1996 to see if the Burlington could – would allow Judds to bid on some contracts?

MR. CONFER: Objection, beyond the scope of cross.

THE COURT: Overruled.

THE WITNESS: Would you ask the question again?

THE COURT: Ms. Schroder, would you please read the question.

[p. 172] (WHEREUPON, the requested portion of the testimony was read back by the court reporter.)

THE WITNESS: I don't recall it at this time.

BY MR. DITTRICK:

Q. And, Mr. Judds, in that same light, in 1996 Mr. Confer asked you whether you were basically in an advisory capacity to Judds Brothers. You remember that?

A. Yes, he did.

Q. And, Mr. Judds, since about 1992 what illness has really resulted in your being just in an advisory capacity to Judds Brothers?

A. I have cancer.

Q. And is that one of the prime – Well, did that – that's enough. I don't want to go into that anymore. Mr. Confer referred in your questions to this brochure. Do you remember that?

A. Yes.

Q. And that's a brochure that Judds Brothers put together with the help of Burlington?

A. Yes.

MR. DITTRICK: Any objection to marking it?

MR. CONFER: No.

MR. DITTRICK: I think it's 165. Would you mark that.

MS. SCIGO: Oh, it's 165?

[p. 173] MR. DITTRICK: It should be.

THE COURT: What number are you giving? One – What number?

MR. DITTRICK: It'll be 165, Judge.

THE COURT: Well –

MR. DITTRICK: Or – Unless the Court wants me to put another number on it.

THE COURT: No, that's all right.

MR. DITTRICK: That all right with you?

MS. SCIGO: That's fine.

THE COURT: Before you do that, Mr. Confer.

(Bench conference off the record with Mr. Dittrick and Mr. Confer.)

BY MR. DITTRICK:

Q. Is Exhibit 165 the brochure you were referring to?

A. Yes.

MR. DITTRICK: I would offer Exhibit 165.

MR. CONFER: No objection.

THE COURT: Received.

BY MR. DITTRICK:

Q. Mr. Confer made reference to a Mr. Wolfe that was a former BN employee that Judds Brothers then hired. You remember that?

A. Yes.

Q. And he also made reference to a individual by the name [p. 174] of Tony Ory who was an engineer and a marketing individual that you had hired?

A. Yes.

Q. Why were those people's employment ended in 1987 or – and 1988?

A. We had no income.

Q. And when Mr. Hudak told you in 1994 that he would not meet with you that day, did he reschedule any meeting with you?

MR. CONFER: I'll object to the question. It doesn't reflect the prior testimony.

THE COURT: I'll sustain the objection. The testimony was he did not talk with Mr. Hudak at all.

MR. DITTRICK: Okay.

BY MR. DITTRICK:

When Mr. Hudak's office informed you that he would not meet with you that day, did his office make any mention of any rescheduling arrangements?

A. No.

MR. DITTRICK: I have no further questions.

THE COURT: Does any member of the jury have any questions they'd like to have us ask this witness? It comes – Would Counsel approach.

(At side bar on the record.)

THE COURT: I don't see any problem with the [p. 175] question, and it's my intent to ask them, but if

you have any objections, I'll let you note them on the record, and then both of you will be given a chance to ask questions regarding – Do you have any objection, Mr. Dittrick?

MR. DITTRICK: Just my general objection before, Judge.

THE COURT: Oh, to the – okay. You can have a continuing objection to –

MR. DITTRICK: Okay.

THE COURT: – the procedure but other than that, you have no objection.

You have no objection?

MR. CONFER: No, Your Honor.

THE COURT: Mr. Judds, is it the practice generally in the construction industry that you have to be invited to bid on a project?

THE WITNESS: You can seek out the – the owner and ask to be invited and then they invite you or they invite you – two different ways that you can do that. We – we take the various reports – building reports, Dodge Report is one of the main ones, and the Builders Bureau, and we use those features to select jobs that we want to be on and bid, and sometimes we contact the owner, sometimes the owners contact us.

THE COURT: But in order to bid on a project, you [p. 176] either – the – the bid documents have to be – the owner has to consent to allow you to bid on the project?

THE WITNESS: Yes.

THE COURT: Do you know, do companies place a limit on the number of contractors that they invite to bid on a project?

THE WITNESS: That can vary, Your Honor. We have had as many as 20 bidders on one project and maybe 3 on another. It just what the owner's wishes are.

THE COURT: All right. And at the time that the tie rehab station project or contract extension was being discussed with Burlington Northern back in 1991 after the fire, did they ever give you any reason for not extending the contract?

THE WITNESS: I think they used the term default, which we did not default on the contract.

THE COURT: Is that the only reference they made?

THE WITNESS: I believe that's what the – the consensus was at that particular time.

THE COURT: All right. I think I have a couple of questions that I would like to . . . After your meeting with Mr. Glavin in – on January 16 of 1990, was the document Exhibit 81, typed up while you were there or prepared while you were there?

THE WITNESS: Yes, it was.

[p. 177] THE COURT: And do you know who prepared it?

THE WITNESS: I have no idea who prepared that document.

THE COURT: It was brought to you by Mr. Glavin?

THE WITNESS: Mr. Glavin left the room. He came back with the document.

THE COURT: Okay. And how long did it take, do you recall?

THE WITNESS: I'm going to say maybe a – maybe 20 minutes to a half hour.

THE COURT: And he – When he brought it back, had he already signed it?

THE WITNESS: I don't remember.

THE COURT: I notice – If you could reach over to your right and just take Exhibit 85 off of the easel, and there – that's the – Exhibit 81 is the document. I notice that there's some handwriting in the margin there right ahead of the lettered paragraphs. Was that written in while you and Mr. Glavin were visiting about this document after it had been prepared?

THE WITNESS: Yes.

THE COURT: And then did you sign it there or did you take it back to Omaha – bring it back to Lincoln before you signed it?

THE WITNESS: I signed it in the presence of [p. 178] Mr. Glavin and only Mr. Glavin.

THE COURT: And then subsequently on January the 22nd or on or about January 22nd or a few days thereafter, you received a copy or you received what has been marked as Exhibit 85; is that correct? Is that right?

THE WITNESS: Yes.

THE COURT: And you read that?

THE WITNESS: Yes.

THE COURT: Did you ever contact Mr. Glavin after that time about the contents of that document?

THE WITNESS: No.

THE COURT: All right. Mr. Dittrick, if the questions of the jury or my questions prompt any further questions on those subjects, you may inquire.

MR. DITTRICK: Just one.

FURTHER REDIRECT EXAMINATION

BY MR. DITTRICK:

Q. Mr. Judds, with regard to that handwriting on Exhibit 81, whose handwriting was that?

A. That was Mr. Glavin's.

MR. DITTRICK: No further questions.

THE COURT: Mr. Confer.

RECROSS-EXAMINATION

BY MR. CONFER:

Q. Did Mr. Glavin put that handwriting on Exhibit 81 while [p. 179] you were present?

A. Yes, he did.

Q. So after this document was typed up which took 20 minutes or so, he brought it to you, you went over it, and you and he discussed it, and then he put that handwriting in there; is that correct?

A. Yes, he did.

Q. When you state that the Burlington Northern gave the reason for not renewing the tie rehabilitation contract as default – do you recall that?

A. Yes.

Q. You recall your testimony? By that did Burlington Northern tell you that they felt that you were not fulfilling your contract?

A. That was my understanding.

MR. CONFER: I have nothing further.

THE COURT: Mr. Dittrick, any redirect?

REDIRECT EXAMINATION

BY MR. DITTRICK:

Q. Did the Burlington feel you were not fulfilling the contract because you wouldn't just go ahead and rebuild and reconstruct for just one more year?

A. That's true.

Q. And when you were having that discussion with the Burlington, did you explain to them – to Mr. Bosshart the [p. 180] cost you would be incurring?

A. Yes, I did.

Q. And that's why you asked him for a renewal?

A. That's correct.

Q. Could you perform the contract after the fire without rebuilding?

A. No.

Q. And did the contract give you a 60-day termination if you couldn't fulfill it?

A. Yes, it did.

MR. DITTRICK: No further questions.

THE COURT: You may be excused, Mr. Judds.

THE WITNESS: Thank you.

THE COURT: You may call your next witness.

MR. DITTRICK: Your Honor, at this time we would like to read from Mr. Glavin's deposition testimony. I would like the Court's ability to have Mr. Jolley act as Mr. Glavin, the chief engineer for Burlington.

THE COURT: You may do so.

Ladies and gentlemen, the Federal Rules of Civil Procedure make provision for the obtaining of testimony of witnesses. You've already heard reference to Mr. Judds's deposition, and the depositions are provided for – the person who's being deposed is placed under oath the same as if he were in the courtroom testifying, there's a court [p. 181] reporter present that takes down everything that is said and the deposition then may be used – under certain circumstances according to the federal rules may be used in court. You're to treat this testimony the

same as any other testimony that you receive during the course of this trial evaluating it along with all of the other testimony in deciding what the facts in this case are.

MR. CONFER: Your Honor, I believe the record should be corrected. Mr. Glavin is no longer with the railroad. He's not the chief engineer of Burlington Northern.

MR. DITTRICK: I concur with that, Judge. I mean, at the time in 1990, he was the chief engineer.

THE COURT: Yeah. He wasn't chief engineer at time the deposition was taken?

MR. DITTRICK: No, I believe he left – Mr. Confer-,

MR. CONFER: Pardon?

MR. DITTRICK: I believe Mr. Glavin left the employment of the Burlington Northern in the summer of '95.

MR. CONFER: I believe that's correct, Your Honor.

THE COURT: And the deposition was taken when?

MR. DITTRICK: Early this year.

MR. CONFER: 1998.

THE COURT: Okay. okay. With that background you may proceed. Is there going to be any request for rulings on [p. 182] any objections? Well, I have Mr. Glavin's deposition. That's right. All right. You may proceed.

MR. DITTRICK: Your Honor, we have – I'm trying not to make this too disjointed here. We also have Mr. Confer's proposed tender of his additional portions. we have underlined those both, so ours and Mr. Confer, and if the Court wants, I'll just read it all so that we kind of have a flow to it.

THE COURT: Mr. Confer?

MR. CONFER: That's agreeable, Your Honor.

THE COURT: All right.

MR. DITTRICK: We have an underlined copy for the Court to show – and green is what Mr. Confer's requested and yellow is what we've requested, so I think we can –

THE COURT: You may hand a copy, Mr. Jolley, to miss Scigo.

THE COURT: You can take the witness stand.

MR. JOLLEY: Thank you, Your Honor.

MR. CONFER: Your Honor, I believe there may be one or two objections –

THE COURT: Well, Mr. Jolley, if you get to a point where there is an objection that's been noted, please don't read the answer until it's indicated whether the objection is withdrawn or the party seeks a ruling on the objection.

All right. You may proceed, Mr. Dittrick.

[p. 183] MR. DITTRICK: Thank you, Your Honor.

BY MR. DITTRICK:

Q. This is offered as admissions against the interests of the Burlington Northern Railroad. It is a deposition of William Glavin which was taken on January 26, 1998. Beginning at Page 4 of the deposition, Line 15. "Mr. Glavin, will you state and spell your name, please?

A. William Edward Glavin, G-l-a-v-i-n.

Q. And who is your present employer?

A. North American RailNet, one word, capital N."

Q. Beginning on Page 5. "And how long have you been working for North American RailNet, Mr. Glavin?

A. Approximately one-and-a-half years.

Q. Approximately the summer of 1996?

A. October of 1996.

Q. And what is your position with North American RailNet.

A. Executive vice president.

Q. And how long have you had that position?

A. Since October of '96."

Q. Beginning on Page 7. "Mr. Glavin, can you tell me in summary what is the general business of North American RailNet?

A. North American RailNet is a short line holding company to buy and operate short line railroad companies."

Q. On Page 8. "Can you describe the lines primarily that [p. 184] it has purchased?

A. We have the Nebraska, Kansas and Colorado RailNet headquartered in Grant, Nebraska, and the Illinois RailNet headquartered in Audubon, Illinois and will be acquiring Camus (ph) Prairie Railroad on April 1st through 3rd headquartered in Lewiston, Idaho.

Q. And I'm not generally familiar with how North American RailNet would operate them. Can you explain that to me?

A. We have their wholly-owned subsidiaries of North American RailNet which have their own general manager and employees that run the day-to-day operation of the railroads."

Q. And on Page 10. "Mr. Glavin, would you give me generally your educational background, please.

A. I have a degree in civil engineering from Michigan State University in 1975, a degree in biology from the Johns Hopkins University in 1971.

Q. After you obtained your degree from Michigan State University, by whom were you employed thereafter?

A. Burlington Northern Railroad.

Q. For how long did you work for the Burlington Northern?

A. Approximately 18-and-a-half years.

Q. Did you leave the Burlington in approximately 1993?

A. 1995. I'm sorry, it was 1977 that I graduated from Michigan State.

[p. 185] Q. Okay.

A. It was 1975 that I graduated from Johns Hopkins.

Q. When you left the Burlington Northern, what was your job title?

A. General manager strategic network design.

Q. As general manager strategic network design, what were your duties?

A. My duties were overseeing and putting together the capital budgets on an annual basis, overseeing industrial engineering, industrial operations analysis. It also included – it also included responsibilities for relationships with courts and other governmental agencies, joint facilities and contracts.

Q. Prior to that time you were general manager strategic network design, what was your position with the Burlington Northern?

A. Vice president of equipment management.

Q. And for how long and what periods of time did you hold that position?

A. From November of 1992 through June of 1994.

Q. And what were – what was your duties as vice president equipment manager?

A. I was responsible for the sizing and the profitability of the car fleet for the Burlington Northern Railroad.

Q. Prior to that what was your job title?

[p. 186] A. System chief engineer.

Q. System chief engineer?

A. Yes.

Q. And what were your duties as system chief engineer?

A. I had responsibility for the overall planning function regarding maintenance and engineering for the Burlington Northern Railroad.

Q. With regard to overall planning for maintenance, generally what does that entail?

A. That entailed the scheduling, developing the standards for maintenance of the railroad, the material usages, also included working to develop what the capital plan would be on an annual basis to keep the railroad up and operating.

Q. And with regard to the planning function for engineering, what did that involve?

A. That again involved – included standards and such environmental reported up through my organization, bridge design, signal design, maintenance on the track, putting together contracts for long-term maintenance activities such as rail grinding, shoulder ballast screening.

Q. How long were you system chief engineer?

A. From February 1st, 1987.

Q. To November of '92?

A. Correct."

Q. Page 16. "Mr. Glavin, to your best recollection, when [p. 187] was the first time you had knowledge of a company known as Judds Brothers Construction Company?

A. When we were looking for a rehabilitation contractor to perform some tie rehab work in Denver in conjunction with our concrete tie program. Not so much Judds, but at least one of its subsidiaries was an active bidder on that project.

Q. Would that be Atlas Construction Company?

A. I think that was the name.

Q. Do you know who recommended that you use Atlas?

A. I believe it was John Bosshart.

Q. Was the tie rehabilitation project in Denver, Colorado a project that was submitted for bids from various construction companies?

A. To my recollection, yes.

Q. And who was in charge to your recollection on behalf of Burlington Northern in letting those bids to various companies?

A. John Bosshart.

Q. Was the tie rehabilitation project something that was under your supervision when it was let for bids?

A. Yes."

MR. CONFER: Your Honor, I don't want to interrupt, but I think that the name should be pronounced Bossheart (ph), and it's important because it's been used in other –

THE COURT: Mr. Jolley, if you would pronounce [p. 188] it –

MR. JOLLEY: Bosshart?

MR. CONFER: Yeah.

BY MR. DITTRICK:

Q. "Was the tie rehabilitation project something that was under your supervision when it was let for bids?

A. Yes, it would have been.

Q. And did it come under your duties as system chief engineer at that time?

A. Yes.

Q. And for approximate time frames – Mr. Glavin, I'm thinking of the time frame around 1985, '86 for that. Would that be about right?

A. I think it would be closer to 1986, 1987.

Q. Okay. After the tie rehabilitation contract, what was your next experience with Judds Brothers?

A. Well, we had some – some continuing conversations during the tie rehab. I did go out and look at the facility that had been constructed out there and met with some of the people on-site and then received a call from Ray on occasion just to find out how everything was going and what was happening.

Q. Other than the tie rehabilitation project, what was your next conversation with anyone from Judds Brothers?

A. To my recollection, Ray called up and indicated he was [p. 189] having some problems with the project. The Burlington Northern, that was under the auspices of the Chicago division or Chicago region, and asked me to see if there was anything I could do about it, get involved.

Q. And which project was this?

A. The Gibson Yards.

Q. And that was the Gibson Yards in Omaha, Nebraska?

A. That is correct.

Q. What do you recall about that first conversation with Mr. Judds about the Gibson Yards project?

A. Ray had a feeling that he was not being treated properly by the Burlington Northern and wanted me to look into it and see what I could find out.

Q. And what did you do?

A. I made a few calls.

Q. To whom?

A. People who were responsible for the project and also our attorneys.

Q. And which people did you call other than your lawyers?

A. Mark (sic) Nelson, John Leeper, Jim Eggen.

Q. After you had these conversations with Mr. Nelson, Mr. Leeper and Mr. Eggen, did you play any other role in the problems that Judds Brothers was having with the Burlington Northern at the Gibson Yard?

A. Well, I think initially I did not, but Ray was fairly [p. 190] insistent and got me involved actually through a series of conversations, and I ended up having some meetings with the attorneys, including yourself, up in Minneapolis as I recall and then some other meetings as well as that then led up ultimately to the January 16 meeting."

Q. On Page 20. "All right. Was the first meeting that you were involved with regarding the Gibson Yard project in Minneapolis where you met with Judds Brothers and their lawyer which was myself?

A. I believe it was."

Q. At Page 22. "After the meeting in Minneapolis and before January 16, 1990, did you have any conversations with anyone from Judds Brothers that you can recall?

A. I think Ray called me a couple more times.

Q. Do you recall the substance of those conversations?

A. Just that Judds Brothers was having some problems because of the lawsuit and the countersuits that were filed, that he was having trouble getting bonding, that he was having trouble getting work and would – you know, whatever I could do, he would appreciate it.

Q. Mr. Glavin, do you know whether as a result of the Gibson Yard difficulties the Burlington Northern actually sued Judds Brothers?

A. I believe there was a lawsuit, yes.

Q. Were you involved in a decision to bring that lawsuit [p. 191] against Judds Brothers?

A. No, I was not.

Q. Do you know, Mr. Glavin, who at the Burlington Northern assumed responsibility for filing that lawsuit against Judds Brothers?

A. I would assume it would have been the law department.

Q. And was Dick Wicka the general counsel at that time?

A. Yes, he was.

Q. Do you know whether – well, do you know other than lawyers who would have been responsible, if anyone, from the Burlington Northern with authorizing that lawsuit against Judds Brothers?

A. I would assume it would be people from the Chicago region.

Q. And who would that be?

A. Well, again Hunter Harrison was the vice president of the Chicago region at the time, John Leeper was the chief engineer.

Q. And when you say John Leeper was chief engineer, what do you mean by chief engineer?

A. He was chief engineer for the Chicago region which had the territory that included Gibson Yard. It was their project. It was not a system level project.

Q. And what was Mr. Hutson's position – Harrison, excuse me?

[p. 192] A. He was the vice president for the region."

Q. On Page 25. "In 1988 then Mr. Leeper was a regional chief engineer?

A. Uh-huh. Correct.

Q. Do you know how many regions there were at that time?

A. I believe there were five regions at that time.

Q. Were there two divisions at that time, the Burlington had a northern division and a southern division, or did that come later?

A. That came later.

Q. Prior to January 16th, 1990, other than Burlington Northern attorneys, did you have any conversations with other Burlington Northern individuals about the possibility of settlement of the dispute between Burlington and Judds Brothers?

A. I believe I mentioned that the potential was out there.

Q. And to whom did you mention that?

A. The people that I thought were principals in the process. John Leeper, of course, probably not Marv

Nelson but probably then I believe we were in the north/south arrangement, so I would have most likely have mentioned it to the people that were responsible for the northern/southern territories, Jerry Albin and Bill Johnson.

Q. In January of 1990, what was Jerry Albin's job description?

[p. 193] A. I think he was the regional chief for the southern territory – southern region.

Q. And Bill Johnson?

A. Northern region.

Q. And the Gibson Yard project would have fallen under which region?

A. Well, the physical Gibson Yards were on southern region, but the project was no longer owned by anybody because the work had been completed."

Q. Okay. 27. "And just let me digress here a minute, Mr. Glavin, because I may be wrong. But it was my understanding that after the settlement was obtained, Burlington Northern hired another construction company for 8 or $900,000 to complete that intermodal facility by laying another layer of concrete. Does that help refresh your recollection at all or not?

A. No, not really. I thought that they'd gone ahead and done that right away so they could utilize the facility.

Q. With regard to the conversations you had with Jerry Albin and Bill Johnson prior to these – to the January 16, 1990 meeting with Ray Judds, do you recall the substance of those conversations?

A. Again, I talked to Jerry Albin –"

THE COURT: Wait a minute. Is that objection –

MR. CONFER: I believe that's withdrawn, Your [p. 194] Honor.

THE COURT: All right. You may continue.

THE WITNESS: "Again, I talked to Jerry Albin and Bill Johnson on a daily basis about everything that was going on from the system level, and they were talking to me about everything that was going on in the region, and in comparing schedules and things like that, I'm sure I mentioned to them that I was going into a meeting and would not be available, but what specifics that we talked about I do not recall. There would be another person that I did talk to and that would have been Jim Eggen because of the lawsuit that had been filed against him."

BY MR. DITTRICK:

Q. "Prior to that January 16, 1990 meeting, Mr. Glavin, did you have any specific settlement authority that you had obtained from the Burlington regarding the dispute between the Burlington and Judds Brothers?

A. I believe there was a series of correspondence dating back since prior to the – well, right after the meeting in Minneapolis which I believe occurred sometime in 1989, the springtime, in which information was asked for and information was exchanged and dollar offers were made and countered.

Q. Are those settlement letters between the Burlington Northern and Judds Brothers you're referring to?

[p. 195] A. No. I believe they were – I don't think they were settlement letters. I believe they were communications between Dick Wicka and you.

Q. Okay. Have you reviewed any of those communications in preparation for your deposition?

A. No. I don't have copies of that."

MR. CONFER: Your Honor, at this point I've objected on the basis of the attorney/client privilege to lines 10 through 15.

MR. DITTRICK: I don't have a problem with withdrawing that, Judge.

THE COURT: I think the objection should be sustained, so you may drop down to Line 21.

BY MR. DITTRICK:

Q. On Page 29, Line 21. "When you went into the meeting with Judds Brothers, what was your understanding of your settlement authority?

A. Approximately $150,000.

Q. What was your understanding of any settlement authority regarding payment of any contractors or subcontractors on the Burlington Northern Gibson Yard project?

A. I think as I recall we were willing to do that in addition.

Q. When you had your meeting, okay, any other authority that you had other than paying the contractors and [p. 196] subcontractors and this $150,000?

A. No.

Q. Do you recall how long your meeting with Ray Judds took on January 16, 1990?

A. Oh, boy, I think I had to break to get additional. authority at some point during this and advised Dick where we stood in the discussions. I would say in excess of 30 minutes, under an hour where it was just Ray and I. So there were preliminary discussions where we had everybody there, and we had – after Ray and I agreed, we had discussions afterwards too as well with everybody there which added to the time.

Q. Where did these meetings take place on January 16, 1990?

A. In the conference room on the 15th floor of the office building in overland Park.

Q. Of the Burlington Northern offices?

A. Yes.

Q. Other than Ray Judds and yourself, who participated in those meetings?

A. The settlement meeting was just Ray and I. Prior to that I believe BN's attorney was there as well as yourself, and I think we had a – Dick Wicka from time to time on conference call.

Q. Other than yourself and Mr. Judds, can you put any names of any other Burlington Northern people that might have been [p. 197] present?

A. It would have been Doug Warner if he was there.

Q. Who is Doug Warner?

A. BN's attorney."

Q. Page 32. "You mentioned at one point in time you had to go back and get additional authority. Did you obtain additional authority?

A. Yes, I did.

Q. And what was your understanding of the additional authority that you obtained?

A. The $250,000 referred to in the letter.

Q. And you're referring to Exhibit 15, correct?

A. That is correct.

Q. With regard to Exhibit 16, Mr. Glavin, do you have that in front of you?

A. Yes, I do.

Q. And I'm looking at the second paragraph of that letter, and the first sentence there says, Judds Brothers Construction continues to be a supplier of construction services to the Burlington Northern Railroad. Who came up with that language?

A. I did.

Q. And why did you come up with that language?

A. This language was a To Whom It May Concern letter for Ray to use with his creditors and potential clients to [p. 198] explain away the situation that had occurred at Gibson Yard and was requested or agreed to under d in the January 16 letter, Exhibit 15.11

MR. DITTRICK: Your Honor, for clarification Exhibit 15 is trial Exhibit 81 and Exhibit 16 is trial Exhibit 85.

THE COURT: Do you agree, Mr. Confer?

MR. CONFER: Yes, I do, Your Honor.

MR. DITTRICK: At the top of Page 23, I think –

THE COURT: Hold on. Let me just –

MR. DITTRICK: Yes.

THE COURT: Oh, the objection is withdrawn.

MR. CONFER: Yes, it is, Your Honor.

THE COURT: You may continue.

BY MR. DITTRICK:

Q. Beginning at the top of Page 33. "To your understanding, why was that letter important?

A. It was important – It was my understanding Ray again was having trouble getting bonding, he was having trouble getting work because of the fact that there were lawsuits, counter lawsuits in conjunction with the work at Gibson Yards. Ray wanted to have something he could show his clients, also something that he could show his creditors as well as people he wanted to do work for that all was forgiven.

Q. And at the time the letter was written, was it your [p. 199] understanding that Judds Brothers did continue to be a supplier of construction services to the Burlington Northern?

A. Ray's subsidiary Atlas was still performing work for us at the Denver facility.

Q. What about Judds Brothers? I'm looking at again Exhibit 16. The sentence says, Judds Brothers Construction continues to be a supplier of construction services.

A. The wording there was essentially that we were using him as in Judds Brothers total which would include Atlas under the tie. We also had some work with another subsidiary of his performing some work up at Havelock.

Q. And Havelock is located in Lincoln, Nebraska?

A. That is correct.

Q. Mr. Glavin, at the time you were writing Exhibit 16, was it your intention to preclude or to forbid Judds Brothers to bid on any future Burlington Northern work?

A. Absolutely not.

Q. Why not?

A. Because as part of the discussions that led to the settlement, Ray had the ability to bid on other Burlington Northern projects."

MR. CONFER: Your Honor, at this point I've objected for lack of knowledge to Lines 17 through Page 35, Line 5.

THE COURT: Overruled. He may – The objection's [p. 200] overruled. He may read the questions. Skip the objections. Just read the questions and answers.

BY MR. DITTRICK:

Q. Page 34, Line 17. "To your understanding was that something that was important to Mr. Judds?

A. Yes. Yes, it was.

Q. And why was that important to Mr. Judds as part of the settlement to your understanding?

A. Ray wanted to have additional work, and he didn't want to be, quote unquote, blackballed by the Burlington Northern Railroad for the problems that had occurred at Gibson Yards.

Q. And, Mr. Glavin, was it your understanding at that time that you were trying to take steps –"

THE COURT: Well, at this time actually.

BY MR. DITTRICK:

Q. Excuse me. "And, Mr. Glavin, was it your understanding at this time that you were trying to take steps in the settlement agreement to assure Mr. Judds that he was not being blackballed by the Burlington Northern?

A. We took steps on the settlement agreement to make sure that the relationship was normalized and that he would be treated the same as any other contractor.

Q. And when you say he would be treated the same as any other contractor, can you define that for us, please?

A. That he would have the ability – he would have the same [p. 201] rights, responsibilities and abilities to bid on projects as any other contractor has with Burlington Northern Railroad.

Q. And was this part of the settlement agreement that you were working – that you were reaching with Judds Brothers on January 16, 1990?

A. Yes, it would have been.

Q. Now, Mr. Glavin, after Exhibits 15 and 16 were signed, did you take any steps to notify anyone in the Burlington Northern system that Judds Brothers' relationship with the Burlington Northern had been normalized and that they were to be treated like any other contractors dealing with the Burlington?

A. That is contract?"

Q. Okay.

THE COURT: Excuse me. I think that should be correct.

BY MR. DITTRICK:

Q. "Okay. That's correct?

A. That is correct.

Q. Okay. What did you do?

A. I made some phone calls to again pertinent people indicating that the dispute had been settled and that they were back on the bid list.

Q. And who did you call?

A. That would have probably been Jerry Albin and Bill [p. 202] Johnson.

Q. And to your best recollection, what did you tell Jerry Albin and Bill Johnson regarding Judds Brothers in these telephone calls?

A. That the lawsuit had been settled, that the problems with Gibson Yard would no longer be held against

Judds Brothers for purposes of – for future project work and that they were on the same competitive basis as any other contractor that would be bidding on miscellaneous projects.

Q. Other than Mr. Albin and Mr. Johnson, did you call anyone else?

A. Not at that time. No."

Q. Page 37. "Okay. Did you –

A. May have called Bob Boileau.

Q. And who is Bob Boileau?

A. He was in charge of construction for the Burlington Northern.

Q. And where did Mr. Boileau office?

A. At that time I believe it was in Overland Park.

Q. Other than Mr. Boileau, Mr. Albin and Mr. Johnson, did you call anyone else?

A. No – Yes. Probably Mr. Eggen to let him know that the lawsuit had been settled.

Q. Did you inform Mr. Eggen to your knowledge that pursuant to the settlement Judds Brothers was – was to be allowed to [p. 203] bid on Burlington Northern projects and treated like any other contractor?

A. I believe I did, yes.

Q. Following January of 1990, Mr. Glavin, did you ever have any conversations with a Trent Hudak or a Jerry Helm or a Mr. Barclay of the Burlington Northern

informing them of this settlement agreement that you had reached with Judds Brothers?

A. Not specifically, no.

Q. Do you recall any conversations with Trent Hudak around June or July of 1994 regarding the bid process of the Burlington Northern and Judds Brothers with a project referred to as the Lincoln freight pit project?

A. I had two conversations after the settlement in 1990 with Ray Judds where Ray called me up to indicate that he did not feel that BN was specifically living up to the agreement and that he should have been awarded the bid and that he felt that the Gibson Yard project was still hanging over him and asked me to look into it, and on both those occasions, I did look into it. one was a grading project as I recall where the bid had busted and it was rebid, and the other was a construction project in the Lincoln area, and I think that was Trent Hudak's area of responsibility. I probably tracked it down through Jerry Albin at first, then Bob Boileau and then ultimately talked to Trent Hudak.

[p. 204] Q. Mr. Glavin, I'm going to refer to those two projects. The first grading project you referred to as the Grand Island grading project and the second project I'm going to refer to as the Lincoln freight pit project, all right?

A. Okay.

Q. With regard to the Lincoln freight pit project, do you recall any of the conversations you had with Mr. Hudak?

A. I can't specifically recall, you know, the specific words, but in general I was finding out from him who the successful bidder was, who the other bidders were, how it was bid, what the process was and what went into his analysis. I don't recall telling him specifically ahead of time why I was doing that because especially under the agreement I wanted to find out if he even knew about problems at Gibson Yard, and to my recollection he didn't even know that there had been a problem at Gibson Yard with the work that Ray had done there. So at that point I was satisfied that that did not enter into Trent's analysis of who should the successful bidder be, and, therefore, we complied with the agreement that we had struck with Ray, and I called Ray up and so informed him."

Q. Page 40. "Mr. Glavin, when you worked with the Burlington Northern Railroad, to your knowledge, how did contractors get on the bid list for Burlington Northern projects?

A. They actively solicited to get on those bid lists, [p. 205] provided – it varied from region to region. We attempted to standardize it that they had to – to be on the bid list and that they had to have sufficient experience or qualifications that allowed him to be on the – to be on it. Quite frankly, of course, there were a lot of contractors. There continue to be a lot of contractors out there.

Q. In 1990 – in January of 1990, was it your understanding that Judds Brothers was on Burlington Northern's bid list?

A. It was my understanding, yes, that Judds Brothers was on Burlington Northern's bid list.

Q. After January of 1990, Mr. Glavin, did you ever give any directions that Judds Brothers was to be taken off of any bid list?

A. No, I did not.

Q. To your knowledge, after January of 1990, was Judds Brothers to stay on Burlington Northern's bid list?

A. Well, the bid list is not a static entity that stays fixed at all times. The bid list is an evolving document. It's the responsibility of the contractor to keep in contact with various people to make sure that they are continuing to be on the bid list. The contractor has to show the desire and the want to bid on the project. If somebody doesn't hear from a contractor, if he doesn't bid on a project or if he's consistently the high bidder on a project, that person will naturally just sort of fall out of the bid process.

[p. 206] Q. Now, is this according to some formal policy of the Burlington or is – was that an informal policy?

A. That's just the way things happen. That's the way things happen in the construction business.

Q. To your knowledge, after January of 1990, did anyone from the Burlington Northern inform you that Judds Brothers was to be taken off of any bid list?

A. No."

THE COURT: Okay. We're going to take our morning recess at this time. Mr. Dittrick, we'll be in recess for 15 minutes.

(Recess at 10:38 a.m. until 10:50 a.m.)

MR. JOLLEY: Your Honor, may I sit in the witness box?

THE COURT: You may. You're on Page 41 beginning at Line 25, Mr. Dittrick.

BY MR. DITTRICK:

Q. "Mr. Glavin, after January of 1990, with regard to bridge work of the Burlington Northern, grading work of the Burlington Northern, utility work of the Burlington Northern in the states of Nebraska, Wyoming, Colorado, which engineer of the Burlington would be in charge of letting those bids to contractors?

A. At that time I believe it would have been within – with the division engineering function. Bob Boileau was in charge [p. 207] of that, and we had various engineers responsible for it in different locations for assembling the bids and putting them out.

Q. Did Mr. Albin play any role after January of 1990 with regard to those types of contracts?

A. Jerry Albin would have had oversight over what Bob was doing, yes.

Q. And to your knowledge, for what period of time would Jerry Albin have had oversight over bridge, grading, utility and building type construction for the Burlington Northern in those states?

A. Probably until he retired in 1995.

Q. When you retired from the Burlington in 1995, prior to that time, had you ever been informed by Mr. Albin that Juids Brothers was taken off of any bid list of the Burlington Northern?

A. No, I was not.

Q. When Mr. Judds called you about these two projects, the Grand Island project and the Lincoln freight pit project, did you have any knowledge at that time that Judds Brothers had been taken off of any bid list of the Burlington Northern?

A. No. And I would assume that they wouldn't have been because they had gotten and bid on those two particular projects.

Q. After the Lincoln freight pit project, and my [p. 208] understanding that's in June of 1994, until you retired with the Burlington in 1995, again, did Mr. Albin ever inform you that Judds Brothers was taken off of any bid list?

A. No. But, you know, I would not be told the people who went on the bid list or came off the bid list. I wasn't even in engineering at that point in time.

Q. But, again, did anyone ever tell you after June of 1994 that Judds Brothers had been taken off of any Burlington Northern bid list?

A. Again, as I said, people – the answer to your question is no. Nobody told me held been taken off, and – but the more direct answer is people typically aren't taken off. They fall off.

Q. Okay. And would you explain to me how people fall off the bid list.

A. I think I explained that to you earlier when I indicated that they show a lack of interest, that they do not respond to bids when they are requested to bid on

them or that their bids are consistently high which might be considered a courtesy bid, and then, therefore, rather than continue to send the packages to them, you focus on the people who continue to be competitive and continue to express an interest.

Q. With regard to the Grand Island project, Mr. Glavin, after your conversation with Mr. Judds, did you take any [p. 209] steps to inquire as to what happened with the Grand Island project?

A. Yes, I did.

Q. And what did you do there?

A. I made a few calls.

Q. Do you recall or do you remember who you called?

A. I believe Jerry Albin and Bob Boileau. There may have been a third person, but I do not recall specifically.

Q. Tell me as best you recollect, Mr. Glavin, what you remember about those phone calls to Mr. Albin and to Mr. Boileau with regard to the Grand Island project?

A. Well, Ray had told me that he was the low bidder, that he was qualified to do the work, and that he should have gotten the project, and he didn't. So I made the calls to find out what happened, and the calls indicated that he was indeed the low bidder but that all bids were over the budget, so they busted the entire bid process, went over the standards and specifications, the design, did a redesign of it and then put it back out for bid again, and on the second bid, Ray was not the low bidder.

Q. Mr. Glavin, in your career with the Burlington Northern, had you ever been involved in projects that were busted and then redesigned and relet for bidding?

A. Yes, I had been.

Q. I'm assuming that was not a totally unfamiliar [p. 210] circumstance for the the Burlington Northern?

A. No, it was not. It was rare, but it was not – you know, it was not out of the ordinary.

Q. In those circumstances that you had prior involvement with busted bids, how did the Burlington handle that as far as notifying the bidders what had happened and what was going to be done in the future?"

MR. CONFER: I'll withdraw the objection.

THE WITNESS: "The in – the instances that I had been involved in, the bid specifications said that the Burlington Northern reserved the right to reject any and all bids in part or in whole, and a letter went out to the contractors simply stating that the bids were rejected in their entirety and that more information would be forthcoming."

BY MR. DITTRICK:

Q. "In those situations that you were involved in, did such letters go out?

A. Yes.

Q. And in those situations that you were involved in, was the project redesigned?

A. Yes.

Q. In those situations that you were involved in, did the Burlington Northern tell the contractors who had bid on the project what the range of bids were initially?

[p. 211] A. Typically, no.

Q. And why not?

A. Because the bids were considered confidential and proprietary material of the contractor who prepared them. The fact that it was busted because of price might have generated some inquiries as to what the price was, but everybody knew what they did, so I don't think that would have been appropriate to give them a range. So you might have signaled the price was too high, period, end of sentence, and that's why rebidding was going to be redone.

Q. When you were working with the Burlington Northern, Mr. Glavin, was there a general policy or practice to award contracts to low bidders?

A. The general policy and practice was to award it to the lowest cost qualified bidder.

Q. Okay. And can you explain that for me, please?

A. Qualifications was a fairly subjective measure whereas the price was an objective measure, but each bid analysis you had to go through and look at every line item, look at your – the likelihood or the quantities associated with those line items being excessive or under, because some bidders might see one aspect of the bid more than another aspect of the bid, and you have to take – you look at your risk associated with that. Let's say he – his is with the quantity of fill – "

[p. 212] THE COURT: Why don't you start that answer again.

THE WITNESS: "Let's say his is with the quantity of fill, and one bidder bid it at a dollar and another bid it at $20, but it balanced out the lower bids elsewhere, and you had a feeling that your fill quantities might go up as opposed to down. You might discount that bidder's bid a little bit. Ability to get bonding, ability to get insurance, ability to complete the work on time, historical track record, who he's done work for, how well he's done that work for, the type of claims that have been associated with the work, overages, underages, change orders, the willingness of the contractor to get the work done, and the quality of his superintendents, and how much other work that particular contractor may have at that point in time which might divert his attention from completing the project on time and on schedule.

Time is of the essence of most of the Burlington Northern agreements. By the time the Burlington made the decision to go ahead and build something, it was imperative that they had it built quickly in order to generate the capacity, the timeliness of the movement of the trains and/or the costs that were associated with the project."

BY MR. DITTRICK:

Q. "Mr. Glavin, in those instances where the low bids of any project were not accepted, was there any policy or [p. 213] practice to your knowledge where the Burlington Northern would try to put in the file somewhere an explanation or justification of why the low bid

was not awarded the contractor – why the low bidder was not awarded the contract?"

MR. CONFER: Withdraw the objection.

THE WITNESS: "In many cases where I did not do it, I – because that was my job when I was down in the Springfield region, I did write a cover letter stating – since I did not have the authority to execute the contract for it that I would write a letter saying that we have reviewed the bid, the apparent low bidder is such-and-such based on qualifications. His dollar amount may be X dollars higher than the next apparent low bidder, but these are the reasons why we selected him."

BY MR. DITTRICK:

Q. "And to whom when you were involved in that work would those types of letters have been given – have been directed?

A. To the person that was responsible for signing and executing the contract. Now, if they were the same people that executed the agreement as analyzed the bid, I assume that the letter would be superficial, that it wouldn't be necessary. I usually – Again, when I did it, and I can't guarantee that that was the practice of everybody, I usually wrote a note explaining why.

[p. 214] Q. While you were working with the Burlington Northern, Mr. Glavin, did you ever hear from any Burlington Northern employees that Judds Brothers was no longer going to be considered a qualified bridge builder?

A. Specifically bridge, no.

Q. Did you ever hear from any Burlington Northern employees that Judds Brothers was not going to be considered a qualified utility contractor for the railroad?

A. No.

Q. While you were working for the railroad, did you hear any conversation from Burlington Northern employees that Judds Brothers was not to be considered a qualified grading contractor?

A. No.

Q. While you were working for the Burlington Northern, did you hear any conversation from any Burlington Northern employees that Judds Brothers was not considered to be a qualified building contractor?

A. No.

Q. While you were working for the Burlington Northern, Mr. Glavin, did you have any conversations with a John Bosshart regarding Judds Brothers' performance of the tie rehabilitation project in Colorado?

A. Many.

Q. And when did those conversations take place?

[p. 215] A. After the fire.

Q. And do you recall approximately when that was?

A. No. I don't have a date.

Q. If I tell you that I think the fire was in the '90/'91 time frame, does that help you at all?

A. That would be – yeah, that would be probably correct.

Q. The conversations that you were having with Mr. Bosshart during that time, why were you talking with Mr. Bosshart?

A. John knew that I had a very particular interest in the concrete tie program and ancillary projects. He also knew that I needed to be informed because it put our secondhand tie program for the year in jeopardy, because we would not be able to generate this secondhand ties from the concrete tie program that we needed to complete our program for the year.

Q. If you could, would you explain to me what the secondhand tie program was and what the concrete tie program was.

A. The concrete tie program was renewing stretches of track that had wood ties with concrete ties. The ties that were removed from the track for the concrete ties were then shipped into a rehabilitation plant where the ties were essentially rehabilitated and culled. Bad ties were scraped and –"

THE COURT: No, scrapped. Scrapped.

THE WITNESS: Excuse me – "scrapped and became the [p. 216] property of the contractor. They could be used for landscape, they could be used for construction, they could be sent to a landfill depending on quality. Better quality ties were – as the holes plugged, they were bundled, and they were shipped back out for installation on other lines for Burlington Northern, typically secondary line branches."

BY MR. DITTRICK:

Q. "To your knowledge, was the Judds Brothers tie rehabilitation contract in Colorado renewed?

A. Renewed as of when?

Q. Or extended after the original period of time?

A. Oh, boy, I knew that it continued until the fire and Judds did not rebuild the plant, and whether there was a renewal involved in that from the time of the initial agreement until the time of the default, I can't tell you.

Q. After Judds refused to rebuild the plant, what did the Burlington do?

A. We got in another contractor to do the work."

Q. Page 54. "After Judds Brothers contract was not renewed, am I correct that the contract was then given to another company in Colorado, and I believe the name was United of Colorado, something like that?

A. I believe so, yes. I don't recall specifically.

Q. Okay. were you involved with any of the conversations with Judds Brothers regarding rebuilding of its plant?

[p. 217] A. I was involved in conversations with John Bosshart indicating that we needed to have the plant rebuilt."

Q. Page 55. "Who at the Burlington Northern had the ultimate authority to renew the tie contract with Judds Brothers or to award the contract to someone else?

A. That would have been – well, that would have been in my shop. John Bosshart would have been delegated that responsibility.

Q. When you had those conversations, do you recall whether or not Judds Brothers was given the opportunity to extend its contract for a period of time?

A. As I recall, Judds Brothers was given every opportunity and encouraged to rebuild that plant."

Q. Page 56. "After the fire at Judds Brothers, to your knowledge with regards to that plant, do you know whether the Burlington offered to renew or extend its contract with Judds Brothers if Judds Brothers, in fact, rebuilt the plant?

A. To my recollection, the process was that Judds Brothers was given every opportunity and encouraged to rebuild the plant and that they defaulted on that contract by not continuing to rehab after the fire.

Q. Do you know whether or not Judds Brothers stated to the railroad that it would rebuild the plant if the contract was renewed or extended?

A. I do not know that, no.

[p. 218] Q. Other than what we've discussed here, Mr. Glavin, do you recall any conversations you had with Mr. Bosshart regarding Judds' tie rehabilitation project, the fire and renewal or extension of the contracts?

A. We expressed disappointment that Ray wasn't going to continue to do the work, that he wasn't going to rebuild the plant, and quite frankly that bothered me.

Q. Were you ever informed by Mr. Bosshart that Mr. Judds offered to rebuild the plant if the contract was renewed and extended?

A. Not that I recall.

Q. Would that have made a difference to you?

A. Yeah, it would have.

Q. Mr. Glavin, while you were employed at the Burlington Northern, were you ever informed that Pat Barclay of the Burlington Northern took Judds Brothers off of the bidding list of Burlington Northern?

A. No. I was not informed of that."

Q. Page 58. "Mr. Glavin, do you have any knowledge of a lawsuit brought by a Burlington Northern employee by the name of Buddy Stanley against the Burlington Northern?

A. I did not know the name, but I'm assuming it's in regard to the incident on the Galesburg division where an employee was injured by a van.

Q. Yes.

[p. 219] A. From the tie bundle?

Q. Yes.

A. Okay.

Q. Were you involved as a result of that Buddy Stanley lawsuit with any decision to sue Judds Brothers or to attempt to bring Judds Brothers into that lawsuit?

A. No, I was not."

MR. CONFER: Your Honor, at this point I believe I've objected on the basis –

THE COURT: My – my note indicates it begins with the next – not this question and answer but in Line 13.

MR. CONFER: I'm mistaken.

THE COURT: You may read the question and answer beginning on Line 2 of Page 59.

BY MR. DITTRICK:

Q. "Did you have any conversations with any Burlington Northern employees regarding the decision to bring Judds Brothers into that lawsuit other than conversations with BN lawyers?

A. I think Mr. Bosshart indicated to me that that had happened."

MR. CONFER: And I objected to the following portion on the basis of hearsay. Page – Page 59, Line 13 through Page 60, Line 4.

THE COURT: Let me read it. I'm going to sustain [p. 220] the objection.

MR. DITTRICK: On what basis, Your Honor?

THE COURT: On the basis that it indicates what feelings a person may have had, and I don't think feelings are relevant or binding on either Burlington Northern or anyone else how a person may feel about something, so on that basis the objections are sustained.

MR. CONFER: I've objected to Page 60, Line 13 through Line 17 on the same basis, hearsay.

THE COURT: Well, I don't know that it's hearsay, but, again, I don't find that it's relevant to the issues in this lawsuit, and I will sustain the objection to Lines 13 through 17.

MR. DITTRICK: Could we have a brief side bar, Your Honor?

THE COURT: You may. (At side bar on the record.)

MR. DITTRICK: I think these are direct admissions by the people at the Burlington Northern who would have knowledge of these facts and circumstances. Bosshart is in charge of that tie plant, and he's saying he doesn't think there was any basis for that lawsuit to be brought at all. That's a direct admission against the interests of the Burlington. I think it's – I think it's very relevant.

MR. CONFER: Your Honor, they had no – they had no [p. 221] responsibility with regard to a – an FELA lawsuit. This is – They were running a tie rehabilitation plant and they're a couple of engineers. These aren't admissions of Burlington Northern. They didn't have any authority to speak for Burlington Northern regarding that lawsuit.

THE COURT: Yeah. I'm going to sustain the objection. I don't think Mr. – I don't even think that this deposition can constitute an admission against interests. Mr. Glavin is not presently a employee of the railroad. He's not – has no official position. I think you certainly have a right to read it, but what he says now does not

constitute an admission against the railroad when he's no longer a – an officer or in a managing capacity.

I'm – I've kept this out – I've kept this out primarily 'cause my feeling – it was my feeling this or my feeling that. That's not evidence of anything but the way people feel. That certainly should not be used as a basis for saying that a corporation is bound by the feelings of some of its managing people, and that's really all he says in there is that we had feelings about it, and he felt this way, I felt this way, but that – I don't consider those to be – even if they fall under the admissions against interest exception to the hearsay rule that they are.

I'm not sure this is necessarily hearsay. If they're officers and managers of the company, it's like a – [p. 222] and maybe it – maybe it is hearsay technically, but it would be an exception under the – under the – under the hearsay rule if, in fact, it was an admission of the company, but I don't think feelings can be admissions. That's – that's the reason I've so ruled, and – and with respect to the last question and answer whether or not he has an opinion on that lawsuit out there, I don't see that Mr. Bosshart had any responsibility for what was happening in Illinois with respect to the conduct of the business of Burlington Northern, and so that's the reason for it, Mr. Dittrick.

MR. DITTRICK: Well, the court reporter's here. Can we just turn to these pages and I'll offer those as an offer of proof?

THE COURT: Okay. Why don't you just give the page and line number. We've – The first one is on Page –

MR. DITTRICK: Page 59 of the deposition beginning at Line 13 –

THE COURT: – through Line 4 of 60.

MR. DITTRICK: And then on Page 60, Line 12 through Line 17.

THE COURT: It's really Line 13 through 17.

MR. DITTRICK: Oh, right. Line 13 through Line 17.

THE COURT: Yeah. The question and answer that fall in that range.

MR. DITTRICK: Okay. I'm offering that as on offer [p. 223] of proof.

THE COURT: Yeah. The ruling on the offer will be the same.

(End of discussion at side bar.)

THE COURT: All right. You may – or do you have another deposition?

MR. DITTRICK: I believe that's the end of that deposition.

THE COURT: You may step down.

* * *

[p. 984] (At 10:55 a.m. on April 6, 1998, with all parties and the jury present, the following proceedings were had:)

THE COURT: All right. Mr. Confer, you may call your witness.

MR. CONFER: Burlington Northern calls William Glavin to the stand.

THE COURT: If you'll step up here first, Mr. Glavin.

THE WITNESS: Okay.

WILLIAM GLAVIN, DEFENDANT'S WITNESS, SWORN

THE COURT: Please be seated. All right. Mr. Confer, you may examine.

DIRECT EXAMINATION

BY MR. CONFER:

Q. Would you – Mr. Glavin, if you'll please be careful to speak into that microphone so that the jurors can hear you.

A. Okay.

Q. Would you state your full name, please.

A. William Edward Glavin.

Q. And what is your address, Mr. Glavin?

A. 1108 Travis Court, Southlake, Texas.

Q. Mr. Glavin, your deposition has previously been – portions of your deposition have previously been read, and we're going to abbreviate your background and so forth, but would you state for the record at this time what your present [p. 985] employment is.

A. I'm executive vice president of Northern American RailNet.

Q. And what is the business of Northern American RailNet?

A. The business is to purchase and operate short line railroad companies.

Q. And what is a short line railroad company?

A. A short line railroad by definition is a class three railroad from the Double AR, the Association of American Railroads. It's based on annual revenues.

Q. And are these smaller rail lines serving limited localities?

A. Well, we have one railraod that's 416 miles, has three lines in Nebraska, Kansas and Colorado. We have another line that's 57 miles long in Illinois, and we have another one that we're starting up on Saturday that's 244 miles long in Idaho and Washington, so they're all various mileage, and they're all various revenue targets.

Q. Were you formerly employed by Burlington Northern Santa Fe Railroad?

A. I was previously employed by the Burlington Northern Railroad.

Q. Which is a predecessor of Burlington Northern Santa Fe?

A. That is correct.

Q. And what years were you employed by Burlington Northern [p. 986] Railroad?

A. Between July 1, 1990 – 1977 and December 31st, 1995.

Q. What was the – your position with Burlington Northern Railroad in 1995 when you left?

A. I was general manager of strategic network design.

Q. Had you previously served as the chief engineer – chief systems engineer of Burlington Northern Railroad?

A. The system chief engineer of Burlington Northern Railroad from February 1987 through October, November of 1992.

Q. The date of your termination of – in that – or the date of your change from that position was what again?

A. In November of 1992.

Q. What were your duties as the system chief engineer?

A. I was responsible for engineering and maintenance on the Burlington Northern Railroad. I had the bridge department reporting to me, I had the signal department reporting to me, I had the telecommunications department reporting to me, I had design, construction, maintenance except for the day-to-day activities of maintenance reporting through my organization, also environmental reporting through my organization.

Q. And were you then the highest-ranking engineering officer on the system?

A. Yes, I was.

[p. 987] MR. CONFER: May I – may I approach, Your Honor?

THE COURT: You may.

BY MR. CONFER:

Q. Can you see that, Mr. Glavin?

A. Yes.

Q. Mr. Glavin, I've placed on the easel what has previously been marked as Exhibit 81. Do you recognize Exhibit 81?

A. Yes, I do.

Q. What is Exhibit 81?

A. It's a letter that I wrote to document an agreement between Ray Judds and myself on January 16th, 1990.

Q. Can you tell us your recollection of what led up to the preparation – Well, let me back up. There's been previous testimony that there was a meeting on January 16th, 1990 in Overland Park, Kansas?

A. That is correct.

Q. Can you tell the Court and jury what led up to that meeting on January 16th of 1990.

A. Well, there had been a series of meetings and a series of letters exchanged between Ray Judds and the Burlington Northern and it had been suggested that the two of us get together and discuss the issues surrounding the Gibson Yard project.

Q. And do you recall where that suggestion originated?

A. I – I believe that came from Dick Wicka in the law [p. 988] department.

MR. CONFER: May I approach again, Your Honor?

THE COURT: You may.

BY MR. CONFER:

Q. Mr. Glavin, I've placed on the easel Exhibit 84 and maybe I ought to just have you read that before I place it on the easel.

A. (Witness complies.)

Q. Do you recall whether you have previously seen Exhibit 84, Mr. Glavin?

A. I – I believe, yes, that I was copied on it.

Q. Do you see the highlighted language on the blowup of Exhibit No. 84?

A. Yes, I do.

Q. And would you read that out loud, please.

A. Therefore, I propose that Ray Judds and Bill Glavin meet one-on-one with no lawyers or anyone else present.

Q. In your deposition testimony, do you recall your testimony concerning who was present at the meeting of January 16th of 1990?

A. Yes, I do.

Q. And what was your recollection at the time you gave your deposition testimony?

A. Well, at the meeting particular, it was just Ray Judds and myself.

[p. 989] Q. Do you recall whether your deposition testimony that there may have been lawyers present –

A. If – if they were, it would have been at a premeeting, but after Mr. Dittrick pointed out that he was not in attendance, it cleared it up that there probably was not even a premeeting. I was confusing it with other meetings that I had.

Q. When you stated that Mr. Dittrick cleared it up, what are you referring to?

A. I had indicated that he had been present at the premeeting and he had responded to me in my deposition that indeed he had not been present at the premeeting.

Q. All right. Based on that suggestion of Mr. Dittrick, what is your recollection concerning whether you had an attorney present on January 16th of 1990 when you were meeting with Mr. Judds or around that time?

A. I would not have had an attorney present then. I did have telephonic communications with Mr. Wicka.

Q. And – and again who is Mr. Wicka?

A. General counsel, litigations and claims for the Burlington Northern.

Q. At the January 16th, 1990 meeting – May I approach again, Your Honor?

THE COURT: You may.

BY MR. CONFER:

[p. 990] Q. Do you recall whether there were any discussions about Judds Brothers Construction company doing Burlington Northern work?

A. Yes, there was.

Q. And will you state what you recall in that regard?

A. Well, one of the things that Ray had asked for was a guarantee of future work on various Burlington Northern projects. I had indicated to him that I couldn't give him such guarantee, that I wouldn't give him such a guarantee, and as a matter of fact, that there probably were not that many projects out there – at that current time, we did not have very many projects planned for the year 1990.

He further went on to ask if we would favor him with some projects such as if he was close in the bidding that we would award it to him instead of somebody else, and I indicated that we would not be willing to do that and that I could not do that. We finally settled on that we would allow him to bid on projects on the same basis as any other contractor, and that the problems that had been associated with the Gibson Yard project would not be used in any analysis of his bid in comparison to other qualified bidders for the purpose of eliminating him from that process or disallowing him from getting that bid.

Q. Did you have any discussion with Mr. Judds concerning the Burlington Northern's use of roller-compacted concrete?

[p. 991] A. Ray at one point asked if we could guarantee that we would give him any future roller-compacted concrete jobs that we'd be doing, and I indicated to him that it was doubtful that the Burlington Northern would be doing any more roller-compacted concrete intermodal facilities in the future.

Q. What's the reason that you recall for that?

A. Basically, it was part of the problems with the Gibson Yard. It soured a lot of people's internal opinions as to the quality and the capabilities of roller-compacted concrete.

Q. When you stated that Mr. Judds asked if he could be favored by being awarded projects when the bidding was close, do you recall anything else about that conversation?

A. No. Just that I closed it again that he would be on the same basis as other contractors, other bidders, and the Gibson Yards would not be held against him.

Q. At the time that you had these conversations with Mr. Judds, were you aware of the types of work that Judds Brothers had done for Burlington Northern in the past?

A. Well, I knew what he was doing for us at Denver with the tie rehabilitation facility, and I was vaguely aware of some work that he had been doing up at Havelock here in Lincoln at the car shop through [sic] I believe it was the Apollo Steel division, and I'd been aware of some projects that he had [p. 992] worked on that people had given him favorable reviews on.

Q. And what types of projects were those to your recollection?

A. Specifically, I do not recall.

Q. Was there any discussion that you recall concerning the types of contracts that Judds Brothers would be allowed to perform for Burlington Northern?

A. I think Ray mentioned if he'd be able to continue to pursue the type of projects that held pursued in the past, but I don't think we specifically talked about the type of projects.

Q. Are you familiar with the Burlington Northern's practice in determining what contractors were to be invited to perform different construction projects at about this time in 1990?

A. You mean the bid process?

Q. Yes.

A. Essentially potential contractors got themselves on the bid list. When a project came up, the people that the bid – on the bid list were contacted and given a proposal or a request for quotation. Those bidders then responded with a quote. Those bids were then analyzed and then the bids were awarded.

Q. Now, when you refer to the bid list, what – what does that refer to?

A. A bid list is just the people who are considered [p. 993] qualified and will get the packages to bid on the various projects.

Q. Was there a master list maintained within Burlington Northern of contractors to your knowledge?

A. To my knowledge, no. It varied from division to division, region to region. Some people wanted to cross regional boundaries, territorial boundaries, some – and work nationwide or wherever the Burlington Northern operated. Some people wanted to just operate locally. So there wasn't a master list.

Q. Do you know whether the regional offices maintained lists of the actual documents of lists?

A. They may have, yes. I did when I was down in Springfield as a regional chief.

Q. How would the contractors for particular types of jobs be selected to bid on those jobs?

A. Again, it'd be based on the marketing of the contractor himself, getting himself on the bid list, knowing what type of work the Burlington Northern had coming up, talking to the engineer, telling him about projects he's done before, telling him about work he's done for other railroads, telling the work he's done for other regions, other divisions of the Burlington Northern. It would also be based on the actual work that that bidder has already done in other territories or on that particular territory.

[p. 994] Q. Who would make the selection of the contractors that were going to be invited to bid on any particular project?

A. It would be the person responsible for bidding – putting out the proposal of the bid.

Q. Within Burlington Northern?

A. Within Burlington Northern's organization, yes.

Q. And who would determine the qualifications of contractors to bid on a particular type of project?

A. The engineer in charge.

Q. Was there any discussion on January 16th of 1990 about the types of projects that Judds Brothers would be considered qualified to bid for Burlington Northern?

A. Just on the nature of those projects that they've done before. Nothing specific.

Q. In your deposition, Mr. Glavin – let me back up. There were some portions of your deposition read into evidence, Mr. Glavin, in which you answered a series of questions of whether you had ever heard that Judds Brothers Construction Company was not a qualified utility contractor, was not a qualified grading contractor and was not a qualified building contractor. Do you recall that series of questions?

A. Yes, I do.

Q. Do you – Did you ever hear either way, that Judds Brothers was qualified or not qualified in any of those areas?

[p. 995] A. I heard that they were qualified as a building contractor.

Q. Did you ever hear about – anything either way about their qualifications as a grading contractor or a utility contractor?

A. Not specifically.

Q. What about as a bridge contractor?

A. Not specifically.

Q. What was the policy – Let me ask you first did Burlington Northern have a policy concerning whether low bidders on competitive – on projects put out for competitive bid would be awarded those projects?

A. Explain policy.

Q. Was there a practice within Burlington Northern to your knowledge concerning whether low bidders would – Well, let me start over again. Had Burlington Northern ever established any directives regarding whether low bidders would receive contracts on various Burlington Northern projects?

A. The Burlington Northern would undertake a thorough analysis of all the bids, at least that was the practice, and in that analysis many things were considered. One of those things were price. That was the one objective measure of the bid analysis, but there were also a series of subjective measures that were looked at in the analysis which [p. 996] included – none of the bid – none of bids were real simple where you were asking, I want this, how much do you want – how much do you want for it, and then you pay for it.

The bids were broken down in tabular form which would indicate we need this much grading done, we need this much pile driving done, we need this much splices done on those piles, we need this much earthwork moved, we need each of these types of items for a total project cost. In analyzing those, the engineer had come

up with the most likely takes, that we were going to move so many yards of earth, that we were going to drive so many feet of piling, that some splices would be required. In tabulating that, they also would use the range of what were the most likely variances on that. Through that whole process then they determined who the apparent best bidder was and the award would go to that apparent best bidder.

Q. When you say the apparent best bidder, would – what factors other than price would be considered in making that determination?

A. The work that he's done before, other project experiences that you've had with him, shortages, overages, change orders, his handling of change orders, the quality of the superintendents, his ability to complete the work in a timely fashion. You'd also look and see how much other work he had out on bid or was out actually performing during that [p. 997] period of time because that could impact your ability to meet your schedule.

Q. Was there any requirement while you were the chief engineer of Burlington Northern Railroad that Burlington Northern accept the lowest bid on a project?

A. No.

Q. When – Were there occasions when the low best bid was not accepted?

A. Yes.

Q. In those instances, was there any – would you describe any requirements for documenting that determination?

A. Well, again, when I was regional engineer in Springfield, I did not have the signature authority to approve a contract, so I would do a write-up, typically one page, which would cover the analysis to the person who did have signatory authority for the agreement advising them who I felt and who I recommended was the best bidder, and if he wasn't the low best bidder, I usually explained why I didn't think the lowest bidder was the best bidder.

Q. Was this a requirement that Burlington Northern had established?

A. It was a requirement that I did because I felt that it was necessary and I think my boss, Jerry Albin, at the time required me to do it too.

Q. Was it a written policy, to your knowledge?

[p. 998] A. I – I never saw one, no, and I never issued one while I was chief.

Q. How was – Going back to the meeting of January 16th of 1990, you mentioned that Mr. Judds was going to be allowed to bid on Burlington projects on the same basis as other contractors; is that correct?

A. That's correct.

Q. How was this policy to be effectuated?

A. How do you mean?

Q. Was there any written documentation of this policy or this provision that was going to allow him to be treated the same as everyone else?

A. No. I made some phone calls to inform the various people who were responsible for the contracting that the Gibson Yard project issues had been settled and that as part of the settlement that Ray was allowed to continue to bid on the basis of any other contractor on the various projects and that the Gibson Yards project would not be held against them in any analysis of his bids.

Q. Let me show you – May I approach, Your Honor?

THE COURT: You may.

BY MR. CONFER:

Q. Before I go into that exhibit, this is your signature on Exhibit No. 81; is that correct?

A. Yes, it is.

[p. 999] Q. Let me show you now what's been marked as Exhibit No. 85 and I'll ask you if you recognize Exhibit 85?

A. Yes, I do.

Q. What is Exhibit 85?

A. That is in compliance with one of the concerns that Ray had raised at the meeting on the 16th, that we give him a letter that he can show to bonding companies, potential clients, potential subcontractors that the issues were no longer between us and – and between the Burlington Northern and Judds Brothers.

Q. I don't know if I can do this, but maybe I can have both of these showing at once. Referring to – You mentioned that this is one of the concerns that he expressed on January 16th of 1990; is that correct?

A. That is correct.

Q. And was there any documentation concerning that in regard to that concern?

A. Well, paragraph d indicated that I will write a letter indicating that the litigation here resulted from a misunderstanding between the parties and that the controversy has been resolved to the mutual satisfaction of Burlington Northern and Judds Brothers.

Q. Who drafted Exhibit 81? That's the one on the left.

A. I believe I did.

Q. And who drafted Exhibit No. 85?

[p. 1000] A. I did.

Q. I see that Mr. Judds' signature appears on Exhibit No. 81; is that correct?

A. That is correct.

Q. Did Mr. Judds review Exhibit No. 81 before signing it to your recollection?

A. Yes, he did.

Q. What about Exhibit No. 85?

A. No, he didn't. I – He asked for the letter and I wrote him one. I don't know if – if I faxed him a copy for him to look at before I sent him a final or not.

Q. Referring to Exhibit No. 85, there is a statement in there that – at the beginning of the second paragraph. Would you read the whole section paragraph aloud.

A. Judds Brothers – Judds Brothers Construction continues to be a supplier of construction services to the Burlington Northern Railroad. Judds has also provided tie rehabilitation service to the Burlington Northern since 1987.

Q. What does that statement refer to, the – referring to the first sentence of the second paragraph? What does that statement refer to to your recollection?

A. Again, Judds was performing work through the Apollo Steel subsidiary to our Havelock shops at the time. He was also doing work through Atlas through the tie rehabilitation facility out in Denver.

[p. 1001] Q. As of what time was that work being done by Apollo and by Atlas?

A. At the time I was writing the letter.

Q. Were there any meetings after January 16th of 1990 between you and Mr. Judds in which there were additional negotiations?

A. No. No more negotiations.

Q. In 1991 – You can slide that back over there.

A. Thank you.

Q. There has been testimony that in the – I believe the summer of 1991 there was a fire which destroyed or did substantial damage to the tie rehabilitation plant that was being operated by Atlas Company. Do you recall that?

A. Yes, I recall that.

Q. Would you – And there – there has also been testimony that at – that after that fire there was some disagreement between Judds Brothers and Burlington Northern concerning fulfillment of that tie rehabilitation contract?

A. As I recall, yes, there was.

Q. What do you recall in that regard?

A. That Ray had no desire to rebuild the plant –

MR. DITTRICK: Excuse me. Could I ask for foundation so I know time, place, who was where, so I can interpose objections and ask that the answer being stricken at this time.

[p. 1002] THE COURT: I think you better lay some foundation as to when the conversations started.

BY MR. CONFER:

Q. Did you have discussions with Mr. Judds after the fire in the summer of 1991?

A. I do not recall having any conversations with Mr. Judds –

Q. Who did –

A. – about the fire.

Q. Who did you have conversations with regarding the fire?

A. John Bosshart who reported up through my organization who had responsibility for ties for the Burlington Northern and also had responsibility for administering the agreement with Mr. Judds.

Q. Without getting into the merits one way or the other on the dispute, to your knowledge, what effect did that fire have on Judds Brothers' status as a Burlington Northern subcontractor?

MR. DITTRICK: I'm going to object, form, foundation and hearsay.

THE COURT: overruled. He may answer.

THE WITNESS: As far as I know, it had no effect on his status performing work.

THE COURT: I think that answered the question.

BY MR. CONFER:

[p. 1003] Q. Mr. Glavin, did you have discussions with Mr. Judds after Judds Brothers was unsuccessful in bidding on the Grand Island grade separation project?

A. Yes, I did.

Q. And what was the – how did those discussions occur?

A. Well, Ray had given me a call and indicated that the award had been made on the Grand Island overpass, that he was the low bidder, and he felt that we had not complied with the – the intention of the January 16th, 1990 letter.

Q. And what did he tell you about his contentions in that you had not complied or that Burlington Northern had not complied with that letter?

A. Well, he specifically felt that he was the low bidder, that he was qualified, and that probably the – the

problems at Gibson Yard were still overhanging – over – hanging over his head in his ability to secure work.

Q. Did you do anything after receiving that – or what did you tell Mr. Judds when he called you and made this concern known to you?

A. I told him I would get back to him and I'd look into it.

Q. And did you get back to him?

A. Yes, I did.

Q. And what did you tell Mr. Judds – Well, let me back up. Before you got back to him, did you make any determinations or investigation concerning the Grand Island [p. 1004] grade separation project?

A. Yes. I called up Jerry Albin who then referred me to Bob Boileau who then told me exactly what had transpired in conjunction with Grand Island overpass bid award. He had indicated to me that the original set of bids had been busted, Ray had been the low bidder on that –

MR. DITTRICK: I'm going to object as to hearsay, Your Honor.

THE COURT: Sustained.

BY MR. CONFER:

Q. What is your understanding, Mr. Glavin, about the reasons that the Grand Island grade separation project was not awarded to Judds Brothers Construction Company –

MR. DITTRICK: Objection.

BY MR. CONFER:

Q. – without relating any conversations you may have had.

MR. DITTRICK: Objection.

THE COURT: How's he going to do that?

MR. DITTRICK: Foundation.

THE COURT: How's he doing to do that? All the information he has as I understand it is from a third person.

MR. CONFER: Well, Your Honor –

THE COURT: I think he can certainly testify as to what he told Ray Judds after he got this information and that whether or not that corresponded with the information he'd [p. 1005] received. I think you can do that.

MR. CONFER: I'll approach it that way, Your Honor.

BY MR. CONFER:

Q. Did you get back to Mr. Judds as you had said you would do?

A. Yes, I did.

Q. And what did you tell – How did you get back to him?

A. By phone.

Q. And what did you tell Mr. Judds when you got back to him?

A. I – I told him that indeed he was the low bidder on the first round of bids, but all the bids had been busted because the project was overbudget, and that the project was then redesigned and reput out for additional bid, and that he was not the low bidder on the final bid.

Q. Did – And when you say the – the bids had been busted, what does that refer to?

A. It means that – Well, Burlington Northern reserves the right to reject any and all bids in their – in the proposals that they send out. The bids for the Grand Island overpass all came in over the capital budget authority. Therefore, since it was an ROI-based project, the project either had to be redesigned or it would be cancelled, so they notified the contractors that none of the bids were accepted, that's where the term busted comes from, and then they did some extensive [p. 1006] engineering rework for the project to bring it in – within the proper subjects (sic) and then let out the bids again.

Q. Was there any consideration given – Well, do you know whether there was any consideration given to increasing the budget on the Grand Island grade separation project?

A. I was one of the proponents of the Grand Island grade crossing project. It made a heck of a lot of sense to me to be done to separate us from the Union Pacific and also create a series of grade separations through the city of Grand Island, so I was paying fairly close attention to it, but there was dissension within the company overall about the viability of that project. Internal analysis performed by the operations analysis group indicated that the savings was not sufficient to justify a high enough

rate of return for the project to go ahead. When the project came in overbudget, both myself and Tom Jargegan (ph) who had been supportive of that project had to pull back from it and had to let it stand on its merits, and we had a budget item that had been approved, it had been approved by the board. The budget was the contract between the engineering department and the board of directors to get a project done within a certain amount of time and at a certain cost. We were not going to be able to do it. We couldn't go back for more money because that put it over the – the hurdle rate for doing an ROI project would be – [p. 1007] the project would be under that hurdle rate, so it had to go back for a redesign.

Q. And what did – What are you referring to when you say an ROI project?

A. Return on the investment.

Q. So it had to –

A. Meet a certain return equation. It had to generate enough savings in the performance of the work to justify doing the work. Sort of like in a bank, you know, you get interest. The return on investment is the interest.

Q. Now, you had – While we're talking about budgets, let me go back to something that you testified to earlier. You mentioned that in – you – your discussions with Mr. Judds on January 16th of 1990, you had stated that you were not sure that there would be a lot of work coming along in 1990. Do you recall that?

A. Yes, I do.

Q. What are you – What were you referring to there?

A. That was referring to my knowledge of the capital budget for construction projects.

Q. And, in fact, did that occur in 1990?

A. I – I think there was some additional items that were approved, but there wasn't all that much work, no, in 1990 at all.

Q. And what is the reason for that?

[p. 1008] A. We had just completed the spin-off of resources, a separate company, Burlington Northern Resources, from Burlington Northern. I think that had left us saddled with a significant amount of debt. That impinged on the debt-equity ratio of the company, and in order to recover from that, we cut back on the capital budget for a number of years. That's – That spin-off took place in the 1987/1988 time frame.

Q. And about how long were – were these cutbacks in the budget taking place?

A. About four years.

Q. Did that have any effect on the budgeting of construction projects on the Burlington Northern?

A. The expansion capital was practically zero and that's where construction projects typically came in. I mean, there was some but not much, about 6,000,000.

Q. Did you also have discussions with Mr. Glavin – I'm sorry, with Mr. Judds about the Lincoln freight pit project after Judds Brothers was not awarded that contract?

A. Yes. He had called me up on that one as well.

Q. And what do you recall about those discussions?

A. Just basically he had thought that he had – should have been awarded that project, that again he thought we were in violation of the 1990 agreement, and I committed to look into it and get back to him.

[p. 1009] Q. And what did you do after you had made that statement to him?

A. I made some phone calls again and ultimately ended up talking to Trent Hudak.

Q. And did you get back to Mr. Judds after you had spoken to Mr. Hudak?

A. Yes, I did.

Q. And what did you tell Mr. Judds when you got back to him?

A. Basically, that – that he wasn't awarded the agreement (sic) – that we had lived up to the 1990 agreement because the Gibson Yards had not entered into Trent's analysis at all.

MR. CONFER: I don't have anything further.

THE COURT: Mr. Dittrick.

MR. DITTRICK: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. DITTRICK:

Q. Mr. Glavin, prior to today you've talked with Ron Confer about your deposition – about – about your testimony here?

A. To a minor extent, yes.

Q. Okay. And when did you talk to him?

A. We had dinner Wednesday night of last week and then we had a phone conversation – a short conversation on Friday afternoon.

[p. 1010] Q. You were here in Lincoln on Wednesday night?

A. Yes, I was.

Q. That was April 1st?

A. Yes, it was.

Q. And how long did you discuss this matter with Mr. Confer?

A. I got in about eight o'clock, and I got back to the hotel about ten, so I would say two hours.

Q. And your telephone call on Friday, how long did you talk with him?

A. About five minutes.

Q. Did you talk to him today at all?

A. This morning, yes, out in the hallway.

Q. For about how long?

A. Five, six minutes.

Q. Prior to last Wednesday, had you talked with Mr. Confer about this case?

A. We had made arrangements for me to come up here, and he had asked me to review my deposition. We

had talked at the time of the deposition, and we had talked in preparation for the deposition in scheduling it.

Q. You ever reviewed your deposition?

A. Yes, I have.

Q. Were the statements that you made in your deposition true and accurate?

[p. 1011] A. Yes, they were.

MR. CONFER: I'll – I'll object. The questions overbroad as to which statements.

THE COURT: Overruled. He may answer.

THE WITNESS: Yes, I did.

BY MR. DITTRICK:

Q. Now, during your meeting with Mr. Judds on January 16th of 1990, you broke and had a conversation with Dick Wicka?

A. That is correct.

Q. And who is Mr. Wicka at the time?

A. He was general counsel, litigation.

Q. And about how long did this break take?

A. Oh, I think it was five or ten minutes.

Q. And this document, Exhibit 81, was a document that the Burlington Northern drafted?

A. That I drafted, yes.

Q. And you drafted it in your office in Overland Park, Kansas?

A. That is correct.

Q. Now, Mr. Glavin, at the time you were meeting with Mr. Judds, I'm assuming you were meeting with him in good faith, correct?

A. That is correct.

Q. And you weren't trying to trick him or deceive him in any way, were you?

[p. 1012] A. No.

Q. And at the time you were meeting with Mr. Judds, it was important for Mr. Judds that he had the ability to bid on Burlington Northern contracts?

A. That was one of the things that he was interested in, yes.

Q. And it was important to Mr. Judds because, quote unquote, he didn't want to be blackballed by the Burlington, correct?

A. That's correct. What did he say about that?

A. He said he did not want to not be capable of bidding on Burlington Northern projects in the future because of the problems that were associated with the Gibson Yard. He did not want that to be used against him if he was going to agree to settle.

Q. But with regard to his ability to bid on jobs, what did you tell him with regard to his ability to bid on jobs?

A. That he would have the same rights, responsibilities, capabilities, he would be able to bid on projects and that the Gibson Yards would not be held against him.

Q. And you told him that he would be able to bid on contracts just like any other contractor – any other contractors, correct?

A. Any other bidder, yes.

[p. 1013] Q. And you told him that the relationship between Judds Brothers and the Burlington Northern was going to be normalized and he would be treated the same as any other contractor?

A. That is correct.

Q. And you also told him that Judds Brothers would have the ability – the same rights, responsibilities and ability to bid on projects as any other contractors had with the Burlington Northern Railroad?

A. That is correct. And that the Gibson Yard project would not be held against him.

Q. Now, you keep mentioning this Gibson Yard. Is this something that you and Mr. Confer have gone over in great detail that you're concerned about? That's why you're getting this out?

A. No. That's what it was.

Q. Oh, okay. That's not something you and he have discussed to say be sure to get this out?

A. No.

Q. Okay. Now, Mr. Glavin, the ability to Judds – for Judds Brothers to bid on contracts of the Burlington Northern, that was very important to Mr. Judds, wasn't it?

A. It was one of the things that was important to him, yes.

Q. And you knew that?

A. Yes.

[p. 1014] Q. And you weren't trying to trick Mr. Judds to say, well I'll get him. I'll tell him he can bid on contracts, but I won't say anything about being the low bidder and that way anybody can reject it. I mean, you weren't trying to evade that topic, were you?

A. No. In fact, we talked about the fact that – when he asked to be favored, and I told him, no, we wouldn't favor him if he was close.

Q. Okay. And was that also implied there? Was it also – Well, let's take it a different way. At the time you understood that generally Burlington awards contracts to low bidders? That's the general practice, isn't it?

A. Define general. Fifty percent of the time, seventy-five percent of the time, a hundred percent of the time?

Q. Well, I don't want to be argumentative with you, Mr. Glavin. I'm – I'm – I'll ask the general question, and I'll give you the opportunity to say – to give a percentage. As – as a general practice, does the Burlington give projects to low bidders?

A. The majority of the time, yes, they do.

Q. Okay. And would you like to put a percentage on it, Mr. Glavin?

A. Well, the majority is defined as 51 percent.

Q. Is that what you're saying?

A. No. I'd say it's greater than the majority. It may be [p. 1015] 80 percent.

Q. And you certainly understood that at the time?

A. That is correct.

Q. And, again, you weren't trying to tell Mr. Judds that just because I'm going to let you bid on contracts doesn't mean you're going to get them? You weren't trying to hide anything from him, were you?

A. I think Mr. Judds knew enough about contracting and enough about the contracting business and enough about the contracting business with the Burlington Northern to be aware of the fact that the low bidder doesn't always get the bid.

Q. Okay. Do you think he would have been aware that the fact that the low bidder generally and 80 percent of the time probably gets the bid?

A. I think he would be aware of that too as well.

Q. And you were aware of that at the time?

A. That is correct.

Q. And you also discussed with Mr. Judds that Judds Brothers was back on the bid list?

A. That is correct.

Q. And those are the words you used to him?

A. I don't know if I specifically used those words at the time of the January 16th, 1990 meeting. I indicated that he would be allowed to bid on various projects.

Q. And that was all part of the agreement?

[p. 1016] A. That was all part of the agreement.

Q. And, in fact, you told him that you would take steps to make sure that he was allowed to bid on projects?

A. I would take steps to make sure that he was allowed to be a qualified bidder, that he was allowed to receive bids, that he was allowed to bid on those bids, that he had the ability to have his bids analyzed and that the problems would not be used as a means to disqualify him.

Q. You wanted him – And you agreed with him that he'd be treated like any other contractor?

A. That he was the same in the eyes of the Burlington Northern as any other contractor except that any other contractor with a problem might have overruled him from the ability to get another job. We eliminated that problem at Gibson Yards as being a factor in the analysis.

Q. And you then called up your subordinates and told them that Judds Brothers was back on the bid list?

A. I indicated that we had settled with Ray Judds, that the problems at Gibson Yard had been satisfied and that they were able to bid on projects again into the future.

Q. Well, you told them that Judds Brothers was back on the bid list; that's what you told them?

A. Back on the bid list as – you know, that's what I said in my deposition, yeah. They were capable of bidding on projects again, that they were not ostracized from bidding on [p. 1017] Burlington Northern projects.

Q. Well, did you tell your subordinates that Judds Brothers was back on the bid list?

A. Specifically back on the bid list? I can't recall the exact language, but the bottom line would have been, yes, something to that effect.

Q. Okay. And one of the people you called was Jerry Albin?

A. That is correct.

Q. And why'd you call Jerry Albin?

A. Jerry Albin had – was the chief engineer responsible for the southern region at that time and would have ultimate responsibility over construction projects on the southern region.

Q. And – and you told Jerry Albin that the lawsuit had been settled, the problems with the Gibson Yard would no longer be held against Judds Brothers, for future project work, Judds Brothers would be on the same competitive basis as any other contractor and that they would be on the bidding list, correct?

MR. CONFER: I'll object, compound.

THE COURT: Sustained. And it's been asked and answered now several times.

BY MR. DITTRICK:

Q. Now, you mentioned I think that you called other people. Is it possible you called a Bob Boileau?

[p. 1018] A. believe I did call Bob Boileau.

Q. And would you tell us who Bob Boileau is.

A. Bob Boileau was the individual responsible for the construction projects throughout the system at that time, I believe.

Q. And you told Bob Boileau the same thing?

A. Effectively, yes.

Q. Did you call a Mr. James Eggen?

A. I believe I did, yes.

Q. And he was a Burlington Northern engineer located in Lincoln, Nebraska?

A. That is correct.

Q. And you told him the same thing?

A. I don't think I told him exactly the same thing. What I told Jim was that the lawsuit had been settled.

Q. Did you tell him that Judds was going to be able to bid on projects and be treated like any other contractor?

A. I – I think Jim's main interest and desire was in knowing that the lawsuit had been settled, so I don't know how much detail I went in – into it with Jim.

Q. Before we've used percentages here, but I want to – I want to ask you this specific question. Is it the

general policy and practice of the Burlington Northern to award projects to the lowest cost qualified bidder?

A. Yeah. That would be the best bidder after the analysis.

[p. 1019] Q. And Mr. Albin (sic), you left the Burlington Northern –

THE COURT: You mean Mr. Glavin.

BY MR. DITTRICK:

Q. Excuse me, Mr. Glavin. I'm sorry. You left the Burlington Northern's employment in December of 1995?

A. That is correct.

Q. Now, as of December of 1995, had Jerry Albin ever called you up to say he was taking Judds Brothers off of any bidding list?

A. Well, understand that Jerry and I did not have a working relationship after 1992 when I left the engineering department, but the answer to your question, he'd have no reason to call me and tell me anything, but prior to that point in time and even after that, he never did.

Q. To your knowledge, did anybody at the Burlington Northern ever discuss with you up to December of 1995 that Judds Brothers was off any bidding list?

A. No.

Q. And when you had your conversations with Mr. Albin around January of 1990 about this agreement you had with Mr. Judds, Mr. Albin was in charge of all bridges, grading, building and utility construction for the railroad?

A. For the – I believe at that time it was the southern region only, not the northern region.

Q. Who would have been in charge of the northern region?

[p. 1020] A. Bill Johnson.

Q. And you called Mr. Johnson and told him about the agreement just like you told Mr. Albin –

A. That is correct.

Q. – correct? So you basically told everybody in the system about your agreement with Mr. Judds?

A. Well, I told three or four people, and whether or not that filters through the entire system – but we know it worked because Ray was getting his bids.

Q. Well, you were making a system-wide agreement with Mr. Judds?

A. That's correct.

Q. Now, at the time you were having your conversation with Mr. Judds in January of 1990, you knew, of course, of Judds' work at the Burlington intermodal facility in Gibson Yard?

A. That is correct.

Q. And that was basically a concrete and grading type of project, wasn't it?

A. That is correct.

Q. And you also knew of Judds Brothers' similar work at the Rennick Yards?

A. That is correct.

Q. Did you know at that time, Mr. Glavin, of the work Judds Brothers had done back in the early 1980s in construction – constructing some 14 bridges on the Donkey Creek project?

[p. 1021] A. I believe I was vaguely aware of that, yes, but not specifically.

Q. Okay. So at the time you were aware that Judds did have a – bridge construction experience with the Burlington Northern?

A. Yeah. I think Ray had informed me of that work.

MR. DITTRICK: Now – May I approach, Your Honor?

THE COURT: You may.

BY MR. DITTRICK:

Q. When you talked with Mr. Confer about Exhibit 81, paragraph d, that the controversy had been resolved to the mutual satisfaction of the parties, that controversy had been resolved in part by your agreeing with Judds Brothers that they would be treated like any other contractors and be allowed to bid on Burlington projects, correct?

A. That is correct. That was part of the conversations that . . .

Q. And that's in part what you meant by that, the controversy had been resolved to the mutual satisfaction of the parties?

A. Yeah, that was part of the discussions.

Q. That was all part of the agreement that you were making?

A. That is correct.

Q. And as part of the agreement that you were making, it was – the Burlington Northern was going to pay the [p. 1022] subcontractors –

A. That is correct.

Q. – pay Judds Brothers a certain amount of money?

A. That is correct.

Q. And – But Judds would pay no money to the Burlington?

A. That is correct.

Q. Okay. With – Regarding the award of bids to certain contractors, is – is there some written policy that the Burlington has that after all bids are received, you were going to review those bids as to timeliness, experience of the superintendents, the other work they have in force, the price that they're bidding? Is there some written policy that the Burlington has about that?

A. I don't believe it's a written policy. I believe it's a practice.

Q. Mr. Glavin, there was some discussion Mr. Confer had about the tie project, and then he also asked you about the freight yard, and he asked you about the Grand Island project. Now, after January of 1990, did you have knowledge of any other construction projects that Judds

had worked on with the Burlington Northern other than those three projects?

A. Not that I'm aware of. Ray was only calling me with problems, not with anything else.

Q. When you had your discussions with Mr. Judds back in January of 1990, did you discuss with Mr. Judds how long he [p. 1023] had been doing work for the Burlington Northern?

A. I think Ray may have mentioned that as part of our discussions. I don't know if he specifically talked about it in the January 1990 meeting, but I know we had had discussions to that prior to – of that prior to that and that was part of his marketing in conjunction with getting the tie plant.

Q. And you understood at that time that Mr. Judds wanted to continue to have a longstanding relationship with the Burlington?

A. That is correct.

Q. And that's why he was meeting with you, wasn't it?

A. He was meeting with me to resolve the problems at the Gibson Yard and the various lawsuits that emanated out of that.

Q. He wanted to bury the hatchet, didn't he?

A. Yes, he did.

Q. And he wanted to continue on his longstanding working relationship with the Burlington, right?

A. That is correct.

Q. And you agreed to work with him in that regard, didn't you?

A. That was part of what we agreed to, yes.

Q. You wanted to restore the working relationship – the longstanding working relationship between the Burlington and [p. 1024] Judds Brothers?

A. We wanted to reestablish that he could continue to perform work for the Burlington Northern and that again the Gibson Yards would not be held against him in that process.

Q. You had an awareness of this lawsuit for a long time, haven't you, Mr. Glavin?

A. Not really. I've been gone for two years, two-and-a-quarter years.

Q. – Back in 1993 who was John Bosshart?

A. John Bosshart was the director of ties.

Q. And back in 1993 you had some discussion with Mr. Bosshart about the Buddy Stanley lawsuit and the Burlington Northern seeking indemnification against the Judds Brothers with regard to that lawsuit?

A. Yes.

Q. And what did Mr. Bosshart tell you about that lawsuit?

MR. CONFER: I'll object, hearsay.

THE COURT: Sustained. It's also way outside the scope of the direct examination, Mr. Dittrick.

MR. DITTRICK: I'm just writing a note, Your Honor, so I can make an offer of proof on that note.

BY MR. DITTRICK:

Q. Mr. Confer asked you questions about the bidding process and awarding bids or projects to contractors. Mr. Glavin, does the Burlington have a practice once bids are received [p. 1025] and the Burlington decides to rebid those projects to tell the contractors the range of the bids?

A. Typically, no.

Q. And why not?

A. Because – Well, again from my point of view, the bids that are received are proprietary information of the contractor and of the railroad and shouldn't be shared with other people.

Q. And when you were having your discussions with Mr. Albin about the Grand Island project, did he make any mention to you that somebody from the Burlington Northern had told Lawrence Construction what the range of the bids were?

A. No.

Q. Did you inquire at all about that topic?

A. I'd have no reason to inquire about that. Ray hadn't even brought that up as an issue.

Q. Did Mr. Judds give you any indication when he talked to you following the Grand Island project that he even knew that the range of bids were given to Lawrence Construction Company?

A. Again, he didn't even indicate to me when he talked to me that the bids had even been busted the first time. I thought he was talking about the second bid that he was the low bidder on, not the first one, when he called me.

Q. Now, Mr. Glavin, when you made this agreement with [p. 1026] Mr. Judds back in January of 1990 that he would continue to be a supplier of services to the Burlington Northern, did you put anything in writing to send out to the Burlington Northern so that system-wide they would know of this agreement?

MR. CONFER: I'll object to the form of the question. It doesn't reflect the prior testimony.

THE COURT: Well, I'll permit him to answer. He's already answered that question once, but, Mr. Dittrick, he may again.

THE WITNESS: No, it was verbal.

BY MR. DITTRICK:

Q. Why didn't you put something in writing so that your successor or Mr. Albin's successor would know about this agreement?

A. The intent was to wipe out the memory of Gibson Yard from everybody that was involved in Gibson Yard for the purposes of doing the analysis and awarding bids. By putting it out in writing, I would have been perpetuating at least in my mind the myth of the problems and the actual problems of Gibson Yard. Therefore, the people who hadn't heard of it before wouldn't know about it and wouldn't be utilizing it in the analysis of

their bids. The people who were aware of it had been told not to utilize it in their bids.

Q. And that's why you had the conversations with Mr. Albin [p. 1027] and with Mr. Johnson?

A. That is correct.

Q. And with Mr. Boileau?

A. Correct.

Q. Now, how were you going to take care of the situation if there were subordinates out there like Marv Nelson or John Leeper or John Bosshart who knew about this and would take steps to denigrate Judds in the future? How were you going to stop any of that?

A. That was where Ray would call me up and talk to me about those issues, and I'd look into them to make sure that that was the case, and that's what he did.

Q. Now, after you left, what was Mr. Judds supposed to do?

A. Nobody assumes they don't live forever, I guess. It didn't enter into the conversations at all.

MR. DITTRICK: I have no further questions.

THE COURT: Any redirect?

MR. CONFER: Yes, Your Honor. I'll be fairly brief.

REDIRECT EXAMINATION

BY MR. CONFER:

Q. When you were being examined by Mr. Dittrick, you mentioned that you had spoken to Mr. Albin and Mr. Johnson but not to other people about this agreement. Do you recall that?

[p. 1028] A. Uh-huh, yes, I do.

Q. And you were asked why you didn't contact other people and you stated you knew that it had worked because Ray was getting these bids. Do you recall that?

A. Yes.

Q. Who are you – What are you referring to there?

A. Well, the fact that Ray had called me up on the Grand Island overpass and the – and the freight pit project indicated that he was meeting and receiving our requests for proposal and was bidding on them.

Q. Do you know of any other projects that he had been awarded or been invited to bid on?

A. No, I do not.

Q. You mentioned that you had had conversations with Mr. Johnson and Mr. Albin. Do you recall whether Mr. Albin had any prior knowledge of the Gibson Yards lawsuit before you called him up?

A. I believe he did, yes.

Q. Do you recall any of the details of that?

A. He was fairly knowledgeable because it was in his territory, and Jim Eggen had been involved, and Jim had reported up through him.

Q. If – if Mr. Albin would have become the chief engineer of the southern region in 1988, would that have been after the problems arose at Gibson Yards?

[p. 1029] A. I'm not – I believe the Gibson Yard problems were in '87, yes, but it may have been in '88 too as well. I – I can't place the time frame. I thought he didn't become chief until '89.

Q. Do you recall anything that Mr. Albin told you about his awareness of the Gibson Yards project?

A. Just that he knew about it. You know, I had briefed him and Bill Johnson both about where I was going to be on the 16th in case they needed to get ahold of me. We talked continuously at that point in time.

Q. Do you recall any other things that he told you about the Gibson Yards that he knew?

A. No. He – he took no offense to me settling it.

Q. You mentioned that projects would be awarded to the lowest cost qualified bidder. What do you mean – What is the lowest cost – or what does that term mean lowest cost qualified bidder?

A. The bidder who after the analysis has the best bid. The lowest cost, the qualifications, all the other issues that I mentioned earlier.

Q. So is it – is there a difference between the lowest – the low bidder and the lowest cost qualified bidder?

A. Well, I – it's the lowest bidder and the best bidder. There is definitely a difference.

Q. Mr. Dittrick asked you about Mr. Judds' desire to [p. 1030] continue to have a longstanding relationship with Burlington Northern. Do you recall that?

A. Yes, I recall the question.

Q. Did you – do you recall any discussion with Mr. Judds about the longstanding relationship, how long this relationship would continue?

A. No. No. Nothing – nothing in the January 16th meeting.

Q. Other than the discussions that you've previously related concerning Mr. Judds' questions to you about Burlington Northern work, were there any discussions about how long this relationship would continue?

A. No.

MR. CONFER: I don't believe I have anything further.

THE COURT: Any member of the jury have any questions? If Counsel want to approach. (At side bar on the record.)

THE COURT: I think I could ask this question without consulting you, but I . . .

MR. CONFER: No objection.

MR. DITTRICK: Just the same.

THE COURT: Okay.

(End of on-the-record discussion at side bar.)

THE COURT: Mr. Glavin, are the qualifications [p. 1031] different from being qualified or – and asked to bid on a project to being qualified to do the job after the bids are in?

THE WITNESS: The – A lot of people try to expand the type of work that they're doing and ask to be onto a bid list as a qualified bidder, so that if they've done work for us before – if they have done work for the Burlington Northern before and had done a good job, you might let them expand that horizon a little bit by bidding on something that they're not quite qualified for or something that they haven't done before.

And then when you go through the qualifications process, depending on where they come in price-wise – I mean, if they're a startling low bidder that has a good reputation, you might indeed give that to – work to them, but if they were all close, and there's somebody more qualified, the better qualified bidder would probably get the work. I hope that answered your question.

THE COURT: There is some distinction between the two then?

THE WITNESS: Yeah.

THE COURT: Mr. Confer, that prompt any further questions?

MR. CONFER: No, Your Honor.

THE COURT: Mr. Dittrick.

[p. 1032] BY MR. DITTRICK:

Q. Are you aware of any distinctions in the qualifications of Judds Brothers versus Lawrence Construction Company?

A. I don't even know Lawrence.

Q. Are you aware of any distinctions –

THE COURT: Well, wait a minute. That – This was a general question, and now you're wanting to get specific on – all he was interested in was – the juror was interested in whether there were different values used in making those two determinations, Mr. Dittrick.

BY MR. DITTRICK:

Q. The – the general qualifications that you talked about, are those set forth in any policy?

A. No. It's based on the marketing of the contractor.

Q. But as far as Burlington knows – I mean, Burlington is trying to judge those qualifications, that isn't set down in any policy anywhere?

A. No, not in writing.

Q. Mr. Glavin, when – when these qualifications are discussed after bids are received, is there any policy that the Burlington has with discussing those qualifications with the actual bidders? Like it's a general policy taking the two low bidders and sitting down and meeting with them and trying to figure out which one might be the best qualified?

A. Typically, no.

[p. 1033] MR. DITTRICK: I have no further questions, Your Honor.

THE COURT: You may be excused, Mr. Glavin.

MR. CONFER: Burlington Northern rests, Your Honor.

THE COURT: Is there any rebuttal testimony?

MR. CONFER: Your Honor, may I renew the motion?

THE COURT: You may. They'll be taken under consideration.

* * *

Supreme Court, U.S.
FILED
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No. 99-828

In The

Supreme Court of the United States

JUDDS BROTHERS CONSTRUCTION COMPANY,

Petitioner,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the constitution or any Federal Rule of Civil Procedure requires a party in a civil case to list its anticipated evidentiary objections in the pretrial order.

II. Whether the constitution or any Federal Rule of Civil Procedure requires a party in a civil case to inform the opposing party of what the opponent must prove to be successful at trial.

III. Whether the constitution or any Federal Rule of Civil Procedure prevents a trial judge from reversing erroneous provisional evidentiary rulings that formed the basis for a judgment and entering judgment as a matter of law as provided in FRCP 50(b).

IV. Whether the constitution or any Federal Rule of Civil Procedure prevents a trial judge from entering judgment based on failure to comply with the statute of frauds, when it was pled as an affirmative defense in the answer and proved at trial.

LIST OF PARTIES

At the time this case was filed, the Plaintiff was Burlington Northern Railroad Company. Subsequently, the Atchison, Topeka and Santa Fe Railway Company merged with and into Burlington Northern Railroad Company and the surviving entity changed its name to The Burlington Northern and Santa Fe Railway Company ("BNSF"). BNSF is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation.

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STATEMENT OF THE CASE

Respondent, Burlington Northern and Santa Fe Railway ("BNSF"[1]), disagrees with many of the assertions in Petitioner's Statement of the Case, and the Court will find, as the Court of Appeals found, they are not supported by the record citations in Judds Brothers' brief. William Glavin did not testify to any oral agreement that Judds Brothers would receive every contract on which it was the low bidder. Moreover, Raymond Judds admitted that Mr. Glavin did not make any such statement.

Contrary to Judds Brothers' statements in its Petition for a Writ of Certiorari, Judds was not surprised or misled by the trial court or BNSF. Judds Brothers' attorney was well aware that the issues concerning whether there were oral settlement agreements were central to the case, and the judge clearly informed both trial counsel that his overruling of BNSF's objections to evidence of oral contracts varying the parties' written agreement was only provisional. The trial judge repeatedly stated that he needed to hear Judds' evidence of the oral agreements before he could determine whether there was an enforceable oral contract, and cautioned the parties that his rulings on admissibility of the oral agreements were subject to change as the trial proceeded or after all the evidence was received. Counsel for Judds Brothers confirmed his understanding of the judge's reasoning, and

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[1] After this case was filed, Burlington Northern Railroad merged with Santa Fe Railway to become Burlington Northern and Santa Fe Railway. For simplicity, Burlington Northern Santa Fe and its predecessor will be consistently referred to herein as "BNSF."

agreed that this was the proper procedure to follow. Significantly, Judds Brothers never suggested that it was surprised that BNSF had challenged the admissibility of its evidence of an oral contract or indicated that it was not prepared to meet BNSF's objections until after judgment was entered for BNSF. Even then, Judds did not proffer any additional evidence of exceptions to the statute of frauds or parol evidence rule that it had not offered at trial. Instead, it argued on appeal that it had offered sufficient evidence of fraud, waiver or other exceptions to the parol evidence rule and the statute of frauds, as well as contending that those defenses had not been established.

A. Judds Brothers' claim.

In this case, Judds Brothers, a Nebraska contractor, alleged BNSF violated oral and written agreements to settle a construction dispute. (Answer, pp. 3-5; App. 46-47). These agreements were allegedly reached during a prior construction suit between Judds Brothers and BNSF's predecessor when William Glavin, former Chief Engineer for the railroad, and Raymond Judds, former president of Judds Brothers, met and negotiated a settlement on January 16, 1990. Glavin and Ray Judds were the only ones present and the only witnesses at trial who had any knowledge of the negotiations.[2] (Tr. 62:9-63:3; App. 155-56).

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[2] In his deposition, Mr. Glavin initially thought both parties' lawyers may have been present in preliminary discussions, but after Judds Brothers' counsel corrected his recollection, concluded that no attorneys were present. (Tr.

At the January 16, 1990 meeting, Mr. Glavin drafted a one-page letter setting forth the agreements reached. (Ex. 81; Tr. 999:23-24, 1011:14-19; App. 326, 337-38). The first paragraph of the letter, Exhibit 81, states:

> This will confirm an understanding you and I reached today ***to settle all litigation and claims*** arising out of the Gibson Yard Intermodal facility at Omaha, Nebraska including HWS and any others associated with this project.[3] ***It is agreed as follows:***
>
> [Subparagraphs A-E set forth the terms to which the parties agreed].
>
> ***If the above terms are acceptable to Judds Brothers please indicate by signing on the line below*** and returning one copy to me.

App. 134-35 (emphasis added).

At trial Ray Judds initially tried to maintain that the written agreement set forth only part of the settlement, but he had previously admitted that the letter completely set forth the terms agreed upon. (Tr. 100:17-20, 102:9-103:18; App. 194, 196-97). When he returned from his meeting with Glavin he showed the letter to his son and another company officer and told them it was the parties' settlement agreement. (Tr. 104:3-20; App. 197-98).

196:18-197:4; 988:5-989:21; App. 285-86; 315-16). Glavin consistently maintained that only he and Judds were present during the settlement negotiations but he had a brief phone call with BN counsel to obtain additional settlement authority and keep him informed on the negotiations. (Tr. 196:3-23, 197:5-13; 988:22-989:21; 1011:7-13; App. 285-86, 315-16, 337).

[3] The underlined language was inserted in Exhibit 81 by interlineation.

Subparagraph (D) of Exhibit 81 states:

> I will write you a letter indicating that the litigation here resulted from a misunderstanding between the parties and that the controversy has been resolved to the mutual satisfaction of Burlington Northern and Judds Brothers.

(App. 135). This provision was included because Judds Brothers had been having difficulty borrowing money, obtaining performance bonds and getting work because of its litigation with the railroad. Raymond Judds had therefore asked for a letter Judds Brothers could show its bonding company, banker and others. (Tr. 104:22-105:8; App. 198-99).

Raymond Judds and Glavin agreed that Exhibit 85, dated January 22, 1990, is the letter that Glavin wrote to comply with paragraph D of Exhibit 81. (Tr. 105:12-18, 999:1-22; App. 199, 325-26).

The second paragraph of Exhibit 85 states:

> Judds Brothers continues to be a supplier of construction services to the Burlington Northern Railroad. Judds has also provided tie rehabilitation service to the Burlington Northern since 1987.

App. 138. When Glavin wrote the above-quoted paragraph he was referring to the ongoing work being done by Judds Brothers and its related companies. (Tr. 1000:19-1001:3; App. 327). Judds Brothers' position at trial, however, was that the first sentence in the paragraph was intended to refer to an oral agreement requiring BNSF to let Judds Brothers bid on any and all projects it felt it was qualified to perform in the future, and to

award it any projects on which it was the low bidder. At trial and on appeal Judds Brothers advanced this theory to explain why the alleged oral contract was not barred by the parol evidence rule or the statute of frauds.

Although Raymond Judds contended there was an "implied" agreement BNSF would award his company every project on which it submitted the low bid, neither Exhibit 81 nor Exhibit 85 contains any mention of Judds Brothers receiving projects on which it is the low bidder, or says Judds Brothers will be able to bid on any BNSF project for any definite or indefinite period in the future. (App. 134-35, 138).

1. Raising the parol evidence rule and the statute of frauds.

In its reply to Judds Brothers' counterclaim BNSF admitted the written settlement agreement dated January 16, 1990, but denied that there were any oral agreements added to that written agreement. BNSF also denied there was any agreement guaranteeing Judds Brothers could bid on BNSF projects for any definite or indefinite time in the future, and denied that any agreement obligated BNSF to accept Judds Brothers' bids. (BNSF Reply to Counterclaim, pp. 1-3; App. 56-59). BNSF pled as its "SECOND DEFENSE" that the oral agreement alleged by Judds Brothers could not be performed within one year, and therefore would violate the Statute of Frauds, Neb. Rev. Stat. §36-202. (Answer p. 3; App. 58).

In the pretrial conference memorandum, BNSF listed as controverted issues:

1. Whether the Settlement Agreement of January 16, 1990, or the letter of 1-22-90 or any oral promise gives Judds a contractual right to bid on Burlington Northern Railraod [sic] construction projects.

2. Whether the Settlement Agreement of January 16, 1990 or the letter of 1-22-90 or any oral promise gives Judds Bros. a contractual right to contract with BNRR.

3. Whether BNRR has breached its Settlement Agreement of January 16, 1990.

(Pretrial Memorandum, p. 3; App. 65).

On March 26, 1998, four days before trial, BNSF filed a motion in limine objecting to the introduction of evidence adding to or contradicting the terms of the written settlement agreement of January 16, 1990. (Motion in Limine, filing no. 47; App. 26). The court took up the motion on the first day of trial and ***provisionally*** denied the motion seeking to exclude evidence *de hors* the written agreement on the basis he needed to hear evidence of the parties' intent before deciding whether extrinsic evidence was admissible. (Tr. 5:24-8:7; App. 139-42). In explaining his denial of the motion in limine at that point, Judge Strom stated:

> [I]n part the ultimate decision of this court as it relates to the issues to be submitted to the jury and to the scope of these contracts . . . requires that the Court have more evidence before it than it does right now, ***and that is not to say that at the close of the plaintiff's case I may conclude that the contract is – is unambiguous and the evidence does [p. 8] not support as it were a – finding that it's ambiguous or***

> ***does not mean what it says, but I'm going to permit the plaintiffs to go forward and put into evidence the discussions that took place . . . when Mr. Judds went down to settle the prior litigation which gave rise to the settlement agreement of January 16, 1990.***

App. 141-42.

On the second day of trial, the trial judge initiated another discussion with counsel outside of the presence of the jury, in which he again stated that his rulings on the admissibility of the evidence of oral contracts were provisional, and that he was continuing to evaluate this evidence to determine whether a jury issue would be presented. Specifically, the Judge expressed "concerns" about Judds Brothers' theory that Exhibit 81 or 85 was a memorialization of oral agreements made between Messrs. Judds and Glavin, sufficient to avoid application of the parol evidence objections in BNSF's motion in limine. Judge Strom reiterated his position that he could not finally determine applicability of the parol evidence rule until he had heard Judds Brothers' evidence concerning the oral agreements made on January 16, 1990. Counsel for Judds Brothers acknowledged that he understood the judge's rulings were provisional, and he concurred that this was the proper procedure under these circumstances.

> THE COURT:. . . . The fact is that if there is a contract here, it seems to me as I read this – and I spent some time last night looking at some cases, and I'm still not – ***nothing that I'm saying here is written in stone by any means,*** but it seems to me that a document, Exhibit 81, dated January 16, 1990 is not the contract that the

parties are really suing on. ***There's nothing ambiguous about that document. It looks to me like when you read paragraph d, it doesn't make any reference to any continuing relationship or continuing to do business.*** That agreement, if it was entered into, was an oral agreement at the time which if it was memorialized at all was memorialized in part or at least referenced in part in the letter of January 22, 1990 [Exhibit 85].

Now, that seems to me to be the posture of this case, and ***I'm not saying that's where I'm going to end up,*** but it seems to me that's the direction we were coming from, and Mr. Dittrick [counsel for Judds Brothers], let me address you first. I don't know if you agree or not, but I would appreciate your thoughts on the observations that I have made in that regard.

MR. DITTRICK: I believe Judge, that the – or, Judge at the meeting on January 16, 1990, there were a number of agreements that were made by the parties. Certainly to dismiss the lawsuit, that was agreed upon, certainly to pay Judds Brothers 250,000, that was agreed upon.

THE COURT: The subcontractor.

MR. DITTRICK: The subcontractor. I mean, certainly that was agreed upon, but ***we think as part of that meeting there was also an agreement*** –

THE COURT: Yeah, ***but it wasn't – it was not a part of the January 16 document.***

MR. DITTRICK: Well, it was and it wasn't. I mean the January 16th referred to that letter [Exhibit 85] and the reason for that letter was as Mr. Confer says, Judge, in part for bonding and for insurance to show people, but ***it was also to***

memorialize the agreement that Judds would continue to be a contractor and was going to be treated like everybody else was. I mean, that was –

THE COURT: *There's nothing in the January 16 document that says that or even infers it really as I see it. I mean, that's where I'm having the difficulty with the January – it just – it says that they'll write a letter –*

MR. DITTRICK: True.

THE COURT: – and that letter was written [Exhibit 85]. The letter in addition – the second paragraph –

MR. DITTRICK: Yes.

THE COURT: – of the letter [Exhibit 85] is the document that presents the issue that we're involved in. Now I don't – I think you could have several – well, I won't say that categorically, but, you know, you could enter into several agreements at one time and not put them all in one document. I have no problem with that.

MR. DITTRICK: Agreed.

THE COURT: It just doesn't seem to me that the January 16th document is the basis for the plaintiff's claims in this case. Now, as I say this isn't –

MR. DITTRICK: I understand.

THE COURT: *I'm just expressing some concerns that I have so that you understand maybe better some of the rulings that I'm making.*

MR. DITTRICK: And I think I understand your concerns, Judge, and I think – *I think I'm in agreement with the Court that we need to hear all the evidence. We need to hear Mr. Glavin's testimony and Mr. Judds, and we'll wrestle with this later.*

THE COURT: *Yeah, we will be, but I'm trying – I'm trying to get things a little bit into perspective, but – but as long as you're aware of what I – my concerns are, then maybe you can be addressing those as we go through this case.*

MR. DITTRICK: I understand, Judge.

Tr. 138-40; App. 227-30 (emphasis added).

During trial BNSF consistently objected to Raymond Judds' oral evidence that added to or contradicted the written agreement. Over BNSF's parol evidence objections, Mr. Judds also claimed other agreements were made at the meeting that are not in the settlement agreement, Exhibit 81, or in Glavin's January 22, 1990 letter, Exhibit 85. He said he told Glavin Judds Brothers wanted to bid on all the work it could handle, and if it was the low bidder it wanted to be awarded the jobs. (Tr. 69:5-69:19; App. 162-63). Whenever he was asked about Mr. Glavin's responses to his settlement demands, Ray Judds repeated the conclusory statement that Glavin "had no problem" with Judds' demands. (Tr. 68:6-7, 69:1-3, 69:22, 71:10, 76:20; App. 161, 162, 163, 165, 170). On cross-examination he was asked what he meant when he said Glavin "had no problem" with his demand that Judds Brothers receive any contract on which it was the low bidder. After being impeached with his deposition, Mr. Judds admitted that he believed the agreement between

him and Glavin was "implied," and that Mr. Glavin had never made any statement that led him to conclude that BNSF had agreed to award Judds Brothers every contract upon which it submitted the low bid. Tr. 107:17-109:22; App. 201-03.

2. Verdict, judgment and appeal.

BNSF moved for a directed verdict after Judds Brothers rested, and renewed the motion after BNSF's evidence, in part on the basis that there was no competent evidence of any agreement that would allow Judds Brothers to recover. These motions were denied. The jury returned a verdict in the amount of $791,232 based on the evidence of an alleged oral contract, and judgment was entered in Judds Brothers' favor for that amount.

BNSF then moved for judgment under FRCP 50(b), on the basis that there was no legally competent evidence to support the judgment in Judds Brothers' favor. (App. 121-24). The District Court agreed and entered judgment for BNSF on the basis that the parol evidence rule did not allow evidence of the oral contract that varied and contradicted the parties' written agreement. (App. 11-12). As an alternative ground for the judgment, the trial judge concluded that the oral contract asserted by Judds did not meet the requirements of the Nebraska statute of frauds. (App. 12-14).

On appeal to the Eighth Circuit, the judgment was affirmed on the basis of the district court opinion. The Court of Appeals also reviewed the record and concluded

that Judds Brothers' constitutional and other arguments lacked any merit. (App. 1-3).

SUMMARY OF ARGUMENT

BNSF was not required to plead or identify its parol evidence and statute of fraud objections in the pretrial order, according to the local rules. The parol evidence rule and the statute of frauds are substantive requirements of Nebraska contract law that Judds Brothers had to comply with to establish its claim. By controverting the issue of whether any oral or written contract contained the promises Judds Brothers alleged, BNSF placed Judds Brothers on notice that it would be required to prove a legally enforceable contract by legally competent evidence.

Judds Brothers was made aware that the judge's rulings on its evidence of oral settlement agreements were only provisional, because the court needed to hear the evidence to determine if there was an enforceable oral contract. The court cautioned the parties that he did not know how he would ultimately rule on this issue. Judds Brothers' counsel agreed that this was the correct procedure to be followed. Judds Brothers was not prevented from presenting any evidence to meet the parol evidence objections or the statute of frauds, and has never proffered any such evidence.

Judds Brothers' constitutional and procedural arguments were carefully reviewed by the Court of Appeals and found to be without merit.

ARGUMENT

1. BNSF did not waive its parol evidence objection or the statute of frauds.

Judds Brothers argues that BNSF waived its parol evidence objections and the statute of frauds by failing to include them in the pretrial conference memorandum. The local rule in the District of Nebraska requires parties to: "Set out in detail each element of the claim or defense which is genuinely controverted. . . . " NELR 16.2(a)(2)(C) (emphasis added).

BNSF complied with this rule by stating, as it had in its pleadings, that it controverted Judds Brothers' claim that there was an oral or written contract which required it to award Judds Brothers any contract on which it was the low bidder. This clearly put Judds Brothers on notice it would be required to establish the requisite elements of its claim with competent legal evidence. It was unable to do so because Raymond Judds' oral evidence added to and contradicted the terms of the parties' integrated written agreement; under the Nebraska parol evidence rule such evidence is inadmissible.

BNSF was not required to anticipate and list each objection it might make to the testimony of Judds Brothers' witnesses. BNSF's indication in the pretrial order that it was controverting Judds Brothers' claims

premised on written and oral promises was adequate notice to Judds Brothers that it would have to present legally admissible evidence to establish the alleged agreements.

Judds Brothers also appears to be relying on the rule that an affirmative defense may be waived if not pled. FRCP 8(c). Unfortunately for Judds Brothers, the parol evidence rule is not an affirmative defense that needs to be set forth specifically in a party's pleading. The parol evidence rule is a substantive rule that governed the evidence Judds Brothers could rely on to prove its contract claim. *E.g., Rayman v. American Charter Fed. Sav. & Loan Assn.*, 75 F.3d 349 (8th Cir. 1996); *Krzycki v. Genoa Nat'l Bank*, 242 Neb. 819, 496 N.W.2d 916 (1993).

Similarly, in Nebraska the statute of frauds is not an affirmative defense. *Ord v. Benson*, 163 Neb. 367, 79 N.W.2d 713 (1956); *Benes v. Reed*, 158 Neb. 128, 62 N.W.2d 320 (1954). Instead, it is a statute with which plaintiff's proof must comply in order to permit recovery. *Johnson v. NM Farms Bartlett, Inc.*, 226 Neb. 680, 414 N.W.2d 256 (1987); *Benes v. Reed, supra*. Nevertheless, the Federal Rules list the statute of frauds as an affirmative defense which must be pled, and BNSF therefore did plead the statute of frauds in its reply to Judds Brothers' counterclaim, thus putting Judds Brothers on notice that BNSF would rely on the statute of frauds. Even so, the burden was on Judds Brothers to prove an agreement that complied with the statute or prove that its claim came within an exception. *NM Farms, supra; Benes v. Reed, supra*. When BNSF raised whether any oral or written contract gave Plaintiff the right to recover as a controverted issue in the pretrial order, Judds Brothers was thereby required to

prove that it had such a contractual right enforceable under Nebraska law. Included in those requirements was the necessity of showing that the contract fulfilled the legal requirements of the statute of frauds.

BNSF's identification of issues in the pretrial memorandum allowed it to challenge Judds Brothers' claims on the basis that the legally competent evidence did not establish a valid oral or written contract. To prove its case, it then became incumbent on Judds Brothers to introduce evidence that was admissible over parol evidence or other objections, and to prove that the alleged contract complied with the statute of frauds. In granting BNSF's post-trial motion for judgment, Judge Strom obviously concluded that the parol evidence rule and the statute of frauds were properly raised by BNSF in its pleadings and in the pretrial order.

2. The trial judge clearly explained that his rulings on the evidence of oral contracts were provisional, and petitioner's counsel agreed this was the proper procedure to follow.

Judds Brothers has accused Judge Strom of misleading it by stating that BNSF had waived its right to rely on the parol evidence rule. To support this contention, it cites a comment by the trial judge questioning whether BNSF could rely on matters not in the pretrial order. (App. 231-232). Read in context, Judge Strom's statement refers to BNSF counsel's attempt to read admissions from Judds Brothers' pleadings that had been superseded by the pretrial order rather than to the parol evidence issue.

Even if the judge's comment was not intended to question whether BNSF should have identified parol evidence questions in the pretrial order at that juncture, however, he repeatedly stated that he was inviting counsel's input because his thinking was only preliminary. (Tr. 137:25-138:20; 139:15-140:21; App. 227-230).

The court's exchanges with counsel outside the jury, which we have recited above, made it quite clear that he considered his rulings on Judds Brothers' oral evidence as preliminary only, and that he was not foreclosing the possibility that he would decide after hearing the evidence that it was barred by the parol evidence rule or the statute of frauds and grant a motion for directed verdict on that basis.

Judds Brothers' counsel was not surprised by the court deciding to follow this procedure of listening to the oral testimony before determining whether it was barred by the parol evidence rule or whether the alleged contract met the requirements of the statute of frauds. In fact, Judds' counsel expressed his agreement with the way in which the judge said he was going to proceed in making his provisional rulings on the parol evidence objections and deciding whether an enforceable oral contract was proved after hearing all the evidence: "I'm in agreement with the Court that we need to hear all the evidence. We need to hear Mr. Glavin's testimony and Mr. Judds, and we'll wrestle with this later." (App. 229-30).

In *Traudt v. Nebraska Pub. Power Dist.*, 197 Neb. 765, 770-74, 251 N.W.2d 148, 151-53 (1977), the Nebraska court made it clear that the parol evidence rule contemplates that testimony will often be necessary for the trial court

to determine the extent of integration of written agreements, and the consequences that flow from integration, by quoting from Wigmore's treatise:

> He says: " . . . the inquiry is whether the writing was intended to cover a *certain subject* of negotiation; for if it was not, then the writing does not embody the transaction on that subject; and one of the circumstances of decision will be whether the one subject is so associated with the others that they are in effect 'parts' of the same transaction, and therefore, if reduced to writing at all, they must be governed by the same writing." 9 Wigmore on Evidence (3d Ed.), §2340, p. 97. He goes on to say: "What it was intended to cover cannot be known till we know what there was to cover. The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered. Thus, the apparent paradox is committed of receiving proof of certain negotiations in order to determine whether to exclude them; and this doubtless has sometimes seemed to lower the rule to a quibble. But the paradox is apparent only. The explanation is that these alleged negotiations are received only provisionally. Although in form the witnesses may be allowed to recite the facts, yet in truth the facts will be afterwards treated as immaterial and legally void, if the rule is held applicable." 9 Wigmore on Evidence (3d Ed.), §2340(2), p. 98.

Id. at 773, 251 N.W.2d at 152-53 (emphasis by the court). *See also,* RESTATEMENT (Second) OF CONTRACTS, §214(a) and (b) (1981). Judge Strom was clearly correct in

concluding that he would provisionally admit the oral testimony upon which Judds relied, so he could decide later whether Judds had established an oral contract enforceable under Nebraska law. Furthermore, Judds Brothers' counsel knew exactly what the court was doing and expressed his agreement with it.

3. Nothing prevented petitioner from introducing evidence to meet the parol evidence rule or the statute of frauds.

Although Judds Brothers argued in the Court of Appeals that it had introduced sufficient evidence of waiver, fraud, mutual mistake or other exceptions to prevent application of the parol evidence rule or the statute of frauds, it now contends it had inadequate opportunity to present such evidence because the trial judge overruled BNSF's objections to Judds' testimony of oral agreements. The judge's exchanges with Judds' counsel quoted above demonstrate, however, that the judge made it very clear that his rulings on the oral contract were provisional. He clearly explained his rulings to Judds Brothers' counsel, and suggested to him that he take care to address the concerns the judge had identified. (App. 230). In view of these discussions, Judds Brothers' claim that it was somehow misled into not introducing some evidence to except it from the parol evidence rule or the statute of frauds is weak indeed.

Moreover, if Judds Brothers had evidence it had not introduced that would have excepted its alleged oral contract from the parol evidence rule or the statute of frauds, it should have proffered the evidence in a motion

for new trial, rather than lamely asserting the existence of such evidence as grounds for a writ of certiorari.

4. The Eighth Circuit has thoroughly reviewed petitioner's constitutional and procedural arguments and found them to be without merit.

On page 5 of its petition, Judds Brothers states: "Thus, Judds' arguments regarding both the fundamental denial of its right to due process, as guaranteed by the Fifth Amendment and the unexplained departure from FRCP 8(c) and 16(e) have never been considered by any court." This statement is inexplicable, since immediately before this assertion, Judds quotes from this straightforward language of the Court of Appeals: ***"As for the appellant's constitutional challenge and any other argument not addressed by the District Court's Opinion, we have thoroughly examined the record and transcripts and find these issues to be without merit."*** (App. 3) (emphasis added).

Although Judds Brothers has stubbornly refused to read this plain English of the Opinion, it is obvious that the United States Court of Appeals for the Eighth Circuit has already carefully reviewed the constitutional and procedural arguments Judds is again making before this Court, and found them to be devoid of substance.

CONCLUSION

There is no compelling reason to grant a writ of certiorari in this matter, as the petition does not present an important federal question, and the courts below have not departed from the accepted and usual course of judicial proceedings. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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